

INFORMATION DISCLOSURE AND THE UNION REPRESENTATION ELECTION

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In its oversight of union representation elections, the National Labor Relations Board seeks to create “laboratory conditions” to determine “the uninhibited desires” of employees. Despite the Board’s intrusive regulation of union and employer campaign conduct, the Board does nothing to insure that employees get basic information relating to their decision. Given the flaws in the market for union representation, particularly with respect to conflicts of interest, the Board should take a more aggressive role in ensuring that employees get the information they need to make rational representation decisions. This Article proposes a new system of mandatory disclosure, modeled on disclosure regimes such as in federal securities regulation, in order to ferret out fraud, provide employees with critical information, and restore worker confidence in unions.

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INTRODUCTION

Last year, for the first time in almost half a century, the percentage of private sector unionization did not decline.¹ This was big news. Since

¹ See U.S. Dep't of Labor, Bureau of Labor Statistics, News Release, Union Membership in 2005, January 20, 2006, *available at*: <http://www.bls.gov/news.release/pdf/union2.pdf> [hereinafter BLS News Release] (noting that the rate of private sector unionization had declined every year from 1983

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the 1950s the percentage of private sector employees who are union members has been steadily and seemingly inexorably falling. At its peak, union members represented more than a third of the workforce.² By 1983, only a fifth were unionized; now, less than thirteen percent are union members.³ Only 7.8 percent of private sector employees are in a union.⁴

The pressure of continued losses has driven union leadership to make organizing their top priority. In 1995, the AFL-CIO elected John Sweeney on a platform of increased outreach and renewed organizing efforts.⁵ His tenure has been marked by a greater attention and resources devoted to organizing efforts.⁶ Despite these efforts, union membership continued to decline. By 2005, there was sufficient disenchantment with Sweeney's efforts that several of the biggest unions in America, including the Service Employees International Union and the Teamsters, left the AFL-CIO and formed a new coalition.⁷

Labor's organizing failures have also confounded labor law scholars.⁸ Given that the labor laws were enacted to give workers an advantage in negotiating with employers, it seems puzzling that workers are less and less interested in taking advantage of those laws. Even critics of the labor law regime concede that employees have strong economic incentives for exploiting the potential monopoly power that unionization provides.⁹ The

until this year). For statistics prior to 1983, see LEO TROY & NEIL SHEFLIN, UNION SOURCEBOOK: MEMBERSHIP, STRUCTURE & FINANCE DIRECTORY app. A at A-1 (1985).

² MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 10 (1987); TROY & SHEFLIN, *supra* note 1, at A-1.

³ BLS News Release, *supra* note 1.

⁴ *Id.*

⁵ Marion Crain & Ken Matheney, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1784-85 (2001).

⁶ *Id.* at 1785 ("Since Sweeney's ascendance to the presidency . . . , the AFL-CIO has made significant progress in revitalizing itself through a renewed commitment to organizing.").

⁷ George Raine, *Dissident Unions Put the Focus on Organizing*, S.F. CHRON., July 31, 2005, at E1.

⁸ See, e.g., Cynthia A. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1529 (2002) ("Why has organized labor's share of the workforce shrunk so dramatically?").

⁹ See, e.g., Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1381-82 (1983) (discussing the potential monopoly power of unions).

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question thus becomes: given these incentives, why have fewer and fewer employees chosen to join unions?¹⁰

The National Labor Relations Act (NLRA) provides the legal framework for employees to choose whether to have collective representation in their relationship with the employer. Under the NLRA, a majority vote determines whether the employees will or will not have a labor organization¹¹ as their representative at the bargaining table.¹² Although the vote is a collective process, each employee must make an individual choice – through a secret ballot – as to whether she wants such representation. The National Labor Relations Board has famously likened the representation election process to “a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.”¹³

The Board has spent seventy years refining the conditions of this laboratory. Countless Board decisions have parsed what an employer may predict about the effects of unionization; what the employer may promise to its employees during the pre-election “campaign” period; what unions may promise to prospective members; and what effects a misrepresentation will have on the parties. What is notable for its absence, however, is the lack of any requirements that certain information be disclosed to employees. Instead, the Board’s primary concern has been curtailing certain types of information that it deems to have a coercive or otherwise adulterating influence. The Board implicitly assumes that the campaign between the union (in favor of its election petition) and the employer (presumably opposed to the election petition) will generate sufficient information for the employees to make an informed and rational decision.

¹⁰ This puzzlement might be characterized as the “What’s the matter with Kansas?” question for labor scholars. Cf. THOMAS FRANK, *WHAT’S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA* (2004) (asking why Kansans vote against their economic self-interest). Frank took his title from a Samuel Gompers article decrying Kansas legislation restricting the right to strike. Samuel Gompers, *What’s the Matter with Kansas?*, 27 AM. FEDERATIONIST 155, 156 (1920).

¹¹ The Act defines a “labor organization” as “any organization of any kind . . . in which employee participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” 29 U.S.C. § 152(5) (2000).

¹² *Id.* § 159.

¹³ *General Shoe Corp.*, 77 NLRB 124, 127 (1948).

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This article challenges that assumption. In evaluating the regulation of the representation campaign, both the Board and the majority of commentators have based that their analyses of representation elections on the model of a political campaign.¹⁴ This analogy is only natural, as the election is conducted much the same way as an election for political office. However, this comparison is misguided. Instead of seeing the representation election as the end result of a political campaign, the election should be treated as a collective economic decision about whether to engage in a certain kind of activity. It is, in fact, a choice to “purchase” union representation services.

Viewed in this manner, it becomes clear that the actors in the “market” – namely, unions and employers – may not always provide the information necessary for employees to make rational decisions about union representation. As will be discussed, unions and employers do not have the proper incentives to disclose certain types of information that might be material to employees. In order to make the market more efficient, policymakers should consider a regime of mandatory, up-front disclosure.

In Part I, the article considers the current regulatory framework for representation elections. This framework, based on the “laboratory conditions” model, is fairly complex but relies almost exclusively on prohibitions against certain types of speech or activity. Part II explores important academic commentary that has suggested new approaches to this framework. One school of commentators believes that the NLRB has layered on too much regulation, while another believes that the NLRB has not done enough to rein in employer abuses. However, both ultimately provide incomplete answers by overlooking the role of information in the representation campaign. Part III discusses reasons to suspect that employees are not getting the information they need to make rational economic decisions about union representation. Part IV contrasts this lack of information with the regime of mandatory disclosure currently imposed upon unions under the Labor-Management Reporting and Disclosure Act (LMRDA). Drawing in part on the established LMRDA framework, Part V then applies an information-disclosure model to the representation process and sets forth the beginnings of a new disclosure regime.

¹⁴ See, e.g., Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964).

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PART I: REGULATING THE REPRESENTATION ELECTION

A. *The Basic Framework*

Under the system established by the NLRA, the representation process begins with a petition – filed by employees, a labor organization, or an employer – avowing that a group of employees wish to be represented by a particular labor organization. The petition proposes a particular “bargaining unit” of employees – namely, a group of employees that are deemed to share collective interests in the terms and conditions of employment.¹⁵ The petition is generally accompanied by evidence that employees support an election to determine the labor organization’s status. At least thirty percent of the employees in the proposed bargaining unit must support an election before the Board will process the petition further.¹⁶ Pre-election hearings will be held if the employer or employees wish to challenge the appropriateness of the bargaining unit proposed by the petition.¹⁷ If the Board determines that the unit is appropriate, it will move ahead with a secret ballot election.¹⁸ If the employees vote in favor of representation, the labor organization is certified as the collective bargaining representative for all of the employees in the unit.¹⁹ Although dissenting employees are not forced to join the union, they may be forced to pay a pro rata share of the collective representation costs incurred on their behalf.²⁰

The NLRA itself does not provide many specifics on the election process. The 1935 Wagner Act²¹ only provided that the Board designate

¹⁵ See *Uyeda v. Brooks*, 365 F.2d 326, 329 (6th Cir. 1966) (citing *NLRB v. Ideal Laundry & Dry Cleaning Co.*, 330 F.2d 712 (10th Cir. 1964)). A bargaining unit can consist of a small number of employees with a particular job description, or it can be all of an employer’s employees.

¹⁶ See 29 C.F.R. § 101.18(a) (2005).

¹⁷ *Id.* § 101.20(a).

¹⁸ *Id.* § 101.21.

¹⁹ See 29 U.S.C. § 159(a) (2000).

²⁰ 29 U.S.C. § 158(a)(3) (2000) (permitting employers to require union membership as a condition of employment); *NLRB v. General Motors Corp.*, 373 U.S. 734, 744-45 (1963) (permitting “agency shop” agreements whereby unions charge non-members for the costs of collective representation).

²¹ The NLRA was created by the Wagner Act and has since been amended, most notably by the 1947 Taft-Hartley Act.

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a representative selected by a majority of the unit employees.²² Initially, the Board deemed evidence of employee sentiment presented at a hearing sufficient to certify a union as representative.²³ However, by 1939 the Board had decided to require secret ballot elections to determine the will of the majority.²⁴ This change was codified in the 1947 Taft-Hartley amendments, which provide that if a question of representation exists, the Board “shall direct an election by secret ballot and shall certify the results thereof.”²⁵ Beyond the need for a secret ballot, the NLRA says little about the election or the regulation of the period prior to the election known as the “campaign period.”

Thus, the regulation of the election process was largely left to the Board to implement. What exactly could be said, and what could not be said? What would be the ramifications of prohibited conduct? It was clear that under § 8(a)(1) of the NLRA, employers could not “interfere with, restrain, or coerce” employees who were exercising rights protected under § 7 of the Act. If an employer’s campaign activities rose to the level of a § 8(a)(1) violation, they were undoubtedly prohibited. But what about campaign activity that might intimidate or coerce employees, but did not violate § 8(a)(1)? Congress had chosen to carve out a fairly big chunk of such conduct for protection through § 8(c) of the NLRA. According to § 8(c), “the expression of any views, argument, or opinion” could not be deemed to an unfair labor practice “if such expression contain[ed] no threat of reprisal or force or promise of benefit.”²⁶ This carve-out, intended in part to comply with the protections of the First Amendment, could have also designated the line between prohibited and permissible conduct during a representation campaign.

The Board chose to go in a different direction. In *General Shoe Corp.*, the Board established that “[i]n election proceedings, it is the Board’s duty to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of employees.”²⁷ In so holding, the Board found that

²² See Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 507 (1993).

²³ *Id.* (noting that for the Board’s first five years roughly a quarter of all unions were certified as representative without an election).

²⁴ *Cudahy Packing Co.*, 13 N.L.R.B. 526 (1939).

²⁵ 29 U.S.C. § 159(c) (2000).

²⁶ 29 U.S.C. § 158(c) (2000).

²⁷ *General Shoe*, 77 NLRB at 127.

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conduct protected by § 8(c) could nevertheless be grounds for setting aside an election. The Board rejected the claim that § 8(c) prohibited the Board from relying on conduct other than an unfair labor practice to overturn an election.²⁸ Since the text of § 8(c) only spoke to the definition of an unfair labor practice, the Board did not view it as a limitation on the grounds for overturning an election.

General Shoe was not merely about the statutory application of § 8(c) in the election context. It set forth a standard, a model, even a philosophy, about how to regulate the representation campaign. The metaphor is one of scientific process: a “laboratory” for an “experiment” with “conditions as nearly ideal as possible” to determine the “uninhibited desires” of employees. The messiness of the political campaign, at least here, is not in evidence; instead, the Board’s purpose is to remove anything that might obstruct or infringe upon the employees’ right to choose. In deciding whether to invalidate an election, the Board stated that “our only consideration derives from the Act which calls for freedom of choice by employees as to a collective bargaining representative.”²⁹ Section 8(c)’s limitations on prohibited conduct were not sufficient.

What then were the requirements of this laboratory? Although the Board continues to rely on the “laboratory conditions” metaphor, at times its allegiance to the underlying principle has been called into question. What follows is a brief overview of the Board’s regulation of speech and conduct during a representation campaign.

B. Prohibited Campaign Speech and Conduct

1. Coercion. Much of what is prohibited in the context of a representation campaign is also a violation of § 8(a)(1). The most obvious category of prohibited activity is coercion, either by union or by employer. Any effort to compel the employee to vote a certain way is deemed not only an infringement on the laboratory conditions but also a trespass against employees’ protected rights. Although threats of

²⁸ *Id.* at 127.

²⁹ *Id.* at 126 (quoting *P.D. Gwaltney*, 74 NLRB 371 (1947)). This sentiment is probably based on the Act’s Findings and Policies Section, which states that one of the declared policies of the Act is to “protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing” 29 U.S.C. § 151.

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physical violence are certainly prohibited, the more common concern is threats of economic coercion by the employer. An employer may not threaten to fire employees or change their working conditions if they support the union.³⁰ A threat to close a plant because of union activity is also prohibited.³¹

However, the line becomes fuzzier when an employer is trying to convince employees of the negative consequences of union representation. The employer is permitted to inform employees about the employer's views on unionization, and unionization may in fact lead to certain events that would make it more likely for the employer to close a plant, perhaps out of economic necessity. Such information would be important, perhaps critical, to an employee's representation decision. But an employer could easily frame threats and other coercion as campaign "predictions." Because the employer has the ultimate control over the fate of the plant, the employer's prediction looks more like a threat. Thus, any regulation in this area must balance the free speech rights of the employer with the rights of employees to be free from economic coercion.

The Supreme Court broadly demarcated the boundaries of threat and prediction in *NLRB v. Gissel Packing Co.*³² The Court held that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit."³³ An employer may even make a prediction about the impact unionization would have on the company. However, such a prediction "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization."³⁴ Any hint that the "prediction" is instead a statement about what an employer might

³⁰ See *E.W. Grobbel Sons*, 322 NLRB 304 (1996) (holding that a discontinuance of benefits was an unlawful reprisal).

³¹ However, the employer may in fact shut down the plant after the election. *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274 n. 20 (1965).

³² 395 U.S. 575 (1969).

³³ *Id.* at 618.

³⁴ *Id.*

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do solely on its own initiative would render such a prediction impermissible.

In practice, the difference between permissible predictions and unlawful threats has often rested on “fine distinctions.”³⁵ Generally, an employer is allowed to make purely objective statements about what has happened in other unionized companies or what the employer’s customers have stated with regard to the effects of unionization.³⁶ However, any interpretation of such “facts” that casts unionization in a negative light is apt to turn the prediction into coercion. The Board and the U.S. Circuit Courts have often differed on where this line is to be drawn. For example, in *DTR Industries*, the Board found that an employer violated § 8(a)(1) through its pre-election letter which stated “our business would automatically be reduced if the union wins the election.”³⁷ However, the Sixth Circuit refused enforcement, finding the letter to be a permissible prediction based on objective fact.³⁸

The Board has also found predictions about the futility of union organizing are generally impermissible threats. The Board reads such predictions as threats to engage in bad-faith bargaining and therefore threats to engage in illegal activity.³⁹ However, employers are permitted to describe their own rights and remedies under the NLRA, even if such descriptions paint a gloomy picture of unionization. For example, in what might be characterized as the “bargaining from scratch” argument, employers may tell employees that they are not required to agree to anything when bargaining with the union, and that they have as much a right to ask for wage and benefit reductions as the union has to ask for increases.⁴⁰ However, an employer may not use this assessment as a threat to bargain in bad faith or a threat to reduce benefits illegally prior to bargaining.⁴¹ Similarly, an employer may offer an opinion about the possibility of union-called strikes, and may note that it has the right to

³⁵ PATRICK HARDIN & JOHN E. HIGGINS, JR., *THE DEVELOPING LABOR LAW* 131 (4th ed. 2001).

³⁶ *Id.* at 130-31.

³⁷ *DTR Industries*, 311 NLRB 833 (1993), *enforcement denied*, 39 F.3d 106 (6th Cir. 1994).

³⁸ 39 F.3d 106, 115 (6th Cir. 1994).

³⁹ *See, e.g.*, *American Greetings Corp.*, 146 NLRB 1440, 1445 n.4 (1964).

⁴⁰ *See Fern Terrace Lodge of Bowling Green*, 297 NLRB 8 (1989).

⁴¹ *See, e.g.*, *Golden Eagle Spotting Co.*, 319 NLRB 64 (1995); *Advo Systems*, 297 NLRB 926 (1990).

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permanently replace employees who go out on strike. Predictions of violence are also prohibited if depicted as the inevitable consequence of unionization. However, the Board has upheld an employer's right to state during a campaign that the union might send someone out to break employees' legs in order to collect dues.⁴²

Ultimately, there is no clear line between impermissible threats and permissible campaign rhetoric. The Board has emphasized the need to look at the totality of the circumstances in figuring out where employer campaign conduct falls. If the overall campaign has had a tendency to threaten employees with possible violations of their collective rights, then the Board will find a § 8(a)(1) violation and overturn the election. However, such determinations, based as they are on a multi-factor contextual test, will be subject to indeterminacy and uncertainty. As such, they threaten either to under-deter coercive threats or over-deter the provision of information that may be material to the employees' decision.

2. *Promises and Grants of Benefits.* In keeping with its efforts to protect the "uninhibited desires" of employees, the NLRA also prohibits bribery. The employer may not promise to better employees' terms and conditions in exchange for support of or opposition to the union. In a famous passage, the Supreme Court described the rationale for the prohibition this way:

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if not obliged.⁴³

The Board and the courts have interpreted § 8(a)(1) to prohibit suspiciously-timed benefits even when no strings are explicitly attached. In order to provide its employees with improved terms of employment during the course of the representation campaign, the employer must show that its actions were motivated by factors other than the campaign.⁴⁴ Clear evidence that the employer had been planning such an improvement

⁴² Sears Roebuck & Co., 305 NLRB 193 (1991).

⁴³ NLRB v. Exchange Parts Co., 375 U.S. 405 (1964).

⁴⁴ American Sunroof Corp., 248 NLRB 748 (1980), *enforced in part*, 667 F.2d 20 (6th Cir. 1981).

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before notice of the campaign will allow the employer to proceed. But if the benefit is discretionary, and the employer's decision not dictated by its previous behavior, the Board may very well find an implicit attempt to interfere with the campaign. So too may efforts by an employer to solicit or remedy employee grievances be deemed impermissible interference.⁴⁵ The Board has determined that suggestion boxes and employee hotlines may amount to an implied promise to remedy employee grievances and thereby would be impermissible under § 8(a)(1).⁴⁶ However, it should also be noted that any efforts to scale back on benefits that would have otherwise been granted (absent the campaign) would also be a § 8(a)(1) violation. Thus, employers must tread carefully in this area: they may be liable for both decisions to grant benefits and decisions not to grant benefits, depending on the circumstances.

Union promises about securing certain terms and conditions have been held to be permissible, since employees, in the Board's view, recognize that such promises are "dependent on contingencies beyond the Union's control."⁴⁷ However, unions are not permitted to offer tangible, valuable benefits to employees in the context of a representation campaign. Elections have been invalidated after union gifts of life insurance coverage,⁴⁸ jackets,⁴⁹ hats and shirts,⁵⁰ and alcoholic drinks.⁵¹ Here, too, however, there has been indeterminacy. One court ruled that a union's promise to hold "the biggest party in the history of Texas" if it won was an impermissible inducement,⁵² while another held that a promise of a victory dinner dance was not objectionable.⁵³ The Board and the courts have also wrestled over the permissibility of union lawsuits against employers on behalf of employees in the midst of a representation campaign.⁵⁴

⁴⁵ See, e.g., *Bell Halter, Inc.*, 276 NLRB 1208 (1985).

⁴⁶ See *DTR Industries*, 311 NLRB 833 (1993); *Torbitt & Castleman, Inc.*, 320 NLRB 907 (1996).

⁴⁷ *Smith Co.*, 192 NLRB 1098, 1101 (1971).

⁴⁸ *Wagner Elec. Corp.*, 167 NLRB 532 (1967).

⁴⁹ *Owens-Illinois, Inc.*, 271 NLRB 1235 (1984).

⁵⁰ *NLRB v. Shrader's, Inc.*, 928 F.2d 194 (6th Cir. 1991).

⁵¹ *Revco D.S. v. NLRB*, 830 F.2d 70 (6th Cir. 1987).

⁵² *Trencor, Inc. v. NLRB*, 110 F.3d 268, 272 (5th Cir. 1997).

⁵³ *NLRB v. L & J Equipment Co.*, 745 F.2d 224 (3d Cir. 1984).

⁵⁴ See, e.g., *Nestle Ice Cream v. N.L.R.B.*, 46 F.3d 578, 584 (6th Cir. 1995) (concluding that union lawsuit on behalf of employees for overtime pay was an impermissible bribe).

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Union offers to waive employee initiation fees have received sustained scrutiny from the Board and the courts. The basic principle was established in *NLRB v. Savair Manufacturing Co.*,⁵⁵ which held that unions cannot offer to waive initiation fees for employees who sign authorization cards before an election.⁵⁶ The Court held that such a practice would allow the union to “buy endorsements and paint a false portrait of employee support during its election campaign.”⁵⁷ However, the Court’s ruling did allow for the waiver of initiation fees more generally: specifically, the waiver had to be open “not only to those who have signed up with the union before an election but also those who join after the election.”⁵⁸ As a result, the Board and circuit courts have been left to parse exactly what a union may say in conveying the waiver during the campaign. The Board and the Seventh Circuit found the union’s waiver unobjectionable when it stated that it “usually does not charge an Initiation Fee” until some time after the election, despite the “usually.”⁵⁹ However, when a union offered to waive fees only to “charter members” without explaining the term,⁶⁰ or said that fees would be waived for “anyone joining now, during this campaign,”⁶¹ such promises were held to violate laboratory principles. The Board permits unions to clarify or correct objectionable waiver offers but holds them to a fairly high standard of clarity.⁶²

⁵⁵ 414 U.S. 270 (1973).

⁵⁶ *Id.* at 277.

⁵⁷ *Id.*

⁵⁸ *Id.* at 272 n.4.

⁵⁹ *Certain-Teed Products Corp. v. NLRB*, 562 F.2d 500 (7th Cir. 1977), *enforcing* 225 NLRB 971 (1976).

⁶⁰ *Inland Shoe Mfg. Co.*, 211 NLRB 724 (1974).

⁶¹ *Crane Co.*, 225 NLRB 657 (1976).

⁶² *See, e.g., Claxton Mfg. Co.*, 258 NLRB 417 (1981) (holding that letter promising no initiation fees “as of this day” was too ambiguous to clarify earlier impermissible waiver offer). An interesting twist on the *Savair* line of cases involves one union’s requirement that a majority of employees prepay a reduced initiation fee and one month’s dues in order for the union to file an election petition. *Aladdin Hotel Corp.*, 229 NLRB 499 (1977). If the union lost the election, the prepaid amounts were forfeit to the union in order to pay for the costs of the campaign. If the union won the election, it opened up the reduced initiation fees to all employees for a period of time after the election. The Board, in a 3-2 decision, upheld the policy, finding that it offered the reduced initiation fee before and after the election. *Id.* at 500. In dissent, two members argued that the lock-in and forfeiture provisions would interfere with employees freedom of choice. *Id.* at 501-02 (Members Penello and Walther, dissenting). The Ninth Circuit declined to

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3. *Inflammatory appeals.* As part of the laboratory conditions doctrine, the Board prohibits appeals to racial prejudice or pride that it deems too “inflammatory” for the campaign. The seminal case in this area is *Sewell Manufacturing Co.*,⁶³ in which the employer appealed to racial prejudice in its anti-union campaign efforts. The employer linked the union to unrelated desegregation efforts and used a picture of a white union official dancing with a black woman in its campaign literature.⁶⁴ The Board found such conduct to be grounds for a new election. According to the Board, racial appeals were only permissible if they were truthful, germane to the election, and not overly inflammatory.⁶⁵

The *Sewell* standard has resulted in a hodge-podge of rulings that, as in other areas, lack the clarity and coherence necessary for uniform application. The Board has generally applied a more lenient standard to appeals of racial pride and solidarity; indeed, such appeals may be a legitimate part of an effort to improve terms of pay and working conditions.⁶⁶ However, the U.S. Courts of Appeal have been less forgiving and have clashed with the Board about such campaign tactics.⁶⁷ The Board has also generally held that appeals to racial prejudice have to be “sustained” in order to meet the prohibited threshold, causing further disagreement. Here too circuit courts have been more willing to overturn elections based on racist remarks despite the Board’s willingness to

enforce the Board’s order after finding the union’s letter to be ambiguous as to the timing of the waiver offer. *NLRB v. Aladdin Hotel Corp.*, 584 F.2d 891 (9th Cir. 1978).

⁶³ 138 NLRB 66 (1962).

⁶⁴ *Id.* at 67.

⁶⁵ *Id.* at 71-72.

⁶⁶ *See, e.g.*, *Baltimore Luggage Co.*, 162 NLRB 1230, 1233 -34 (1967) (noting that appeals to racial unity may be “directed at undoing disadvantages historically imposed” and may be a way to “unify groups of employees by focusing group attention on common problems”).

⁶⁷ *See, e.g.*, *NLRB v. Schapiro & Whitehouse*, 356 F.2d 675 (4th Cir. 1966) (refusing to enforce bargaining order because of appeals to racial pride); *KI (USA) Corp.*, 35 F.3d 256, 260 (6th Cir. 1994) (denying enforcement of a bargaining order based on the union’s use of a letter by a Japanese businessman which allegedly inflamed racial tensions); *Case Farms v. NLRB*, 128 F.3d 841, 850 (4th Cir. 1991) (Williams, J., concurring in judgment) (expressing “concern with the Board’s apparent disregard for the decisions of the Circuit Courts” in matters of concerning inflammatory racial appeals).

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tolerate limited instantiations of such behavior.⁶⁸ The vague standards, combined with the concern that legitimate speech may be prohibited, have led to calls for reform of this doctrine.⁶⁹

4. *Misrepresentations.* The regulation of misrepresentations is perhaps the most infamous example of the Board's willingness to depart from precedent, as demonstrated by a series of decisions in the 1970s which piled reversal on reversal on reversal. Before we get to these cases, however, it is important to note what they are not about: namely, the Board's overall approach to misrepresentations. The Board has not wavered from its generally-held view that misrepresentations are not prohibited during the election campaign. As the Board noted, "exaggeration, inaccuracies, half-truths, and name calling, though not condoned, will not be grounds for setting aside an election."⁷⁰ The Board stated: "absolute precision of statement and complete honesty are not always attainable in an election campaign, nor are they expected by employees."⁷¹ Thus, unlike the strict rules of truthfulness in such contexts as the corporate proxy contest,⁷² the Board has taken a relatively relaxed approach to misrepresentations throughout its history.

From 1962 to 1977, the Board did regulate a subset of misrepresentations that it felt had a particularly nefarious effect on the representation campaign. The rule, established in *Hollywood Ceramics Co.*,⁷³ stated:

[A]n election should be set aside only where there has been a misrepresentation or other campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether

⁶⁸ See, e.g., *M&M Supermarkets v. NLRB*, 818 F.2d 1567 (11th Cir. 1987); *NLRB v. Eurodrive*, 724 F.2d 556 (6th Cir. 1984); *NLRB v. Triplex Mfg. Co.*, 701 F.2d 703 (7th Cir. 1983). Cf. *Clearwater Transport, Inc. v. NLRB*, 133 F.3d 1004, 1010 (7th Cir. 1998) (voicing a "strong objection" to the NLRB's "seemingly casual reading" of past precedent in such cases).

⁶⁹ See, e.g., *Shepard Tissue, Inc.*, 326 NLRB 369, 369-73 (1998) (Gould, Chairman, concurring) (arguing for a new approach to the *Sewell* doctrine).

⁷⁰ *Hollywood Ceramics Co.*, 140 NLRB 221, 226 n.6 (1962).

⁷¹ *Id.* at 223.

⁷² See SEC Rule 14a-9, 17 C.F.R. § 240.14a-9 (2004).

⁷³ 140 NLRB 221 (1962).

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deliberate or not, may reasonably be expected to have a significant impact on the election.⁷⁴

Thus, a simple misrepresentation was clearly not enough to negate the campaign. The election objection would be struck if the misrepresentation concerned an unimportant matter *or* had no significant impact *or* was made at a time that allowed for effective rebuttal or correction. A misrepresentation would also be insufficient to overturn the election if it was so exaggerated as to be unbelievable or if employees had sufficient information already to permit them to evaluate the misrepresentation properly.⁷⁵ Obviously, many of these factors are subject to vagaries of interpretation: “substantial departure,” “significant impact,” sufficient time for an “effective reply.” Once again, the Board’s standard was subject to the usual criticisms.⁷⁶

The Board overruled *Hollywood Ceramics* in its 1977 *Shopping Kart* decision.⁷⁷ In that decision, the Board washed its hands of any regulation of campaign misrepresentations. In coming to its conclusion, the Board cited several academic works, including two pieces discussed below.⁷⁸ Noting that the *Hollywood Ceramics* rule had been criticized for its vagueness and indeterminacy, the Board argued that such attention to campaign propaganda was unnecessary. In fact, it argued that “Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it.”⁷⁹ To hold otherwise would be to countenance “a view of employees as naive and unworldly whose decision on as critical an issue as union representation is easily altered by the self-serving campaign claims of the parties.”⁸⁰ The three-member majority, citing studies about actual employee behavior during election

⁷⁴ *Id.* at 224.

⁷⁵ *Id.*

⁷⁶ Bok, *supra* note DB1.

⁷⁷ *Shopping Kart Food Market*, 228 NLRB 1311 (1977).

⁷⁸ Julius Getman & Stephen Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976); Bok, *supra* note DB1; ROBERT E. WILLIAMS, PETER A. JANUS, AND KENNETH C. HUHN, NLRB REGULATION OF ELECTION CONDUCT (1974).

⁷⁹ *Shopping Kart*, 228 NLRB at 1313.

⁸⁰ *Id.*

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campaigns,⁸¹ felt that employees could properly evaluate the truth and falsity of campaign claims themselves.⁸²

A year later, the Board reversed course, and a three-member majority in *General Knit of California* returned to the *Hollywood Ceramics* standard.⁸³ The majority took on the principles enunciated in *Shopping Kart*, stating that the *Shopping Kart* majority was “in error” as to its basic view of campaign behavior.⁸⁴ The *Hollywood Ceramics* standard, according to the majority, was not premised on a view that employees were “naïve and unworldly.”⁸⁵ Instead, the majority argued that “no matter what the ultimate sophistication of a particular electorate, there are certain circumstances where a particular misrepresentation or misrepresentations may materially affect an election.”⁸⁶ Accordingly, “employees should be afforded a degree of protection from overzealous campaigners who distort the issues by substantial misstatements of relevant and material facts within the special knowledge of the campaigner, so shortly before the election that there is no effective time for reply.”⁸⁷ The dissenters-turned-majority jousted with the empirical studies cited by the *Shopping Kart* majority,⁸⁸ and argued that the old standard could be enforced in a vigorous yet consistent manner.⁸⁹

Four years later, however, the hands-off policy of *Shopping Kart* was yet again reinstated by a three-member Board majority in *Midland*

⁸¹ *Id.* (citing Getman & Goldberg, *supra* note JG2, at 276-79). The dissenting Members took issue with the majority’s use of the study, noting *inter alia* that 22 percent of employees had “precise recall” (within ten percent) of union claims about wages made by union employees elsewhere. *Shopping Kart*, 228 NLRB at 1315-16 (Fanning & Jenkins, Mems., dissenting in part). One of the dissenters then separately wrote to criticize the study itself. *Id.* at 1318 (Jenkins, Mem., dissenting) (criticizing the Getman & Goldberg article for “nonprobative factual data and non sequitur logic”).

⁸² However, one member of the majority wrote in concurrence that she would set aside an election if there had been an “egregious mistake of fact.” *Id.* at 1314 (Murphy, Chair., concurring).

⁸³ *General Knit of California*, 239 NLRB 619 (1978).

⁸⁴ *Id.* at 620.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* (quoting *Shopping Kart Food Market*, 228 NLRB 1311, 1315 (1977) (Fanning & Jenkins, Mems., dissenting in part)).

⁸⁸ *General Knit*, 239 NLRB at 621-22.

⁸⁹ *Id.* at 622-23.

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*National Life Insurance Co.*⁹⁰ After reviewing the history of the Board's treatment of misrepresentations,⁹¹ the majority argued in favor of the bright-line, hands-off standard, citing the "many difficulties attending the Hollywood Ceramics rule," as well as the need for "the certainty and finality of election results."⁹² Although the majority reaffirmed the view that "mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it,"⁹³ it did not spend much time on this issue, nor did it refer to the empirical studies debated in *Shopping Kart* and *General Knit*. The majority did make clear that the Board still would overturn election in instances "where a party has used forged documents which render the voters unable to recognize propaganda for what it is."⁹⁴

The decision in *Midland* remains the law. Interestingly, some circuit courts have been rather grumbling in their acceptance of the *Midland* standard. In *NLRB v. New Columbus Nursing Home*,⁹⁵ the First Circuit endorsed the Board's holding below, but noted that "we do not necessarily endorse application of the *Midland* rule to situations involving charges of more fundamental and clear-cut misrepresentations."⁹⁶ Noting that the Board had "a duty to provide reasonably for the employees' 'unhampered freedom of choice,'" the court held that a strict adherence to *Midland* might, in some cases, "constitute legal error."⁹⁷ Similarly, the Sixth Circuit has held that "[t]here may be cases where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected."⁹⁸ The Sixth Circuit continues to apply this standard to

⁹⁰ *Midland Nat'l Life Ins. Co.*, 263 NLRB 127 (1982).

⁹¹ *Id.* at 129-30.

⁹² *Id.* at 131.

⁹³ *Id.* at 132 (quoting *Shopping Kart*, 228 NLRB at 1313).

⁹⁴ *Midland*, 263 NLRB at 133.

⁹⁵ *NLRB v. New Columbus Nursing Home*, 720 F.2d 726 (1st Cir. 1983).

⁹⁶ *Id.* at 729.

⁹⁷ *Id.* (citation omitted). In concurrence, Judge Bailey Aldrich wrote: "*Midland* seems to be burning down the barn to get rid of the rats; an abnegation of the Board's recognized duty to ensure a fair and free choice of bargaining."

⁹⁸ *Van Dorn Plastics Machinery Co. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984).

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misrepresentation cases.⁹⁹ While other circuit courts have adopted the *Midland* standard,¹⁰⁰ a number of circuit courts, including ones in circuits that have adopted it, have not yet decided whether to “fully support” the standard.¹⁰¹

C. Information Disclosure in the Representation Campaign

Despite the finely-grained regulation of what cannot be said during the representation campaign, the Board has done little to require information disclosure from the parties. There are no affirmative disclosure requirements on the part of employers or unions to provide certain kinds of information to employees. In *Florida Mining & Materials Corp.*, the Board rejected the employer's efforts to impose an “affirmative disclosure” requirement on the pre-election process.¹⁰² In that case, the union failed to reveal to the employees that the day before the election, it had been placed under temporary trusteeship by the international union. The employer sought to overturn the election based on the union's failure to disclose. The authority of the Board to impose such a rule was not questioned; however, the Board refused to do so based on its concerns about the administrative burden it would cause. The Fifth Circuit found that the Board had not abused its discretion.¹⁰³

The only instance of such required disclosure is not information that must be disclosed to employees, but rather information that the employer must disclose to the petitioning union. In *Excelsior Underwear, Inc.*, the

⁹⁹ See *N.L.R.B. v. St. Francis Healthcare Centre*, 212 F.3d 945, 963-66 (6th Cir. May 19, 2000); *N.L.R.B. v. Hub Plastics, Inc.*, 52 F.3d 608, 611-13 (6th Cir. May 08, 1995).

¹⁰⁰ *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 883-84 (D.C. Cir. 1988); *State Bank of India v. NLRB*, 808 F.2d 526, 538-39 (7th Cir. 1986); *NLRB v. Semco Printing Ctr., Inc.*, 721 F.2d 886, 892 (2d Cir. 1983); *NLRB v. Monark Boat Co.*, 713 F.2d 355, 360 (8th Cir. 1983); *NLRB v. Yellow Transp. Co.*, 709 F.2d 1342 (9th Cir. 1983).

¹⁰¹ *Trencor Inc. v. NLRB*, 110 F.3d 268, 276 (5th Cir. 1997) (holding that it was “unnecessary to determine the full scope of this court’s support for the *Midland* doctrine”). See also *NLRB v. Dave Transportation Co.*, 1999 WL 196545, at *1 n.1 (9th Cir. April 1, 1999) (unpublished) (noting that they need not decide whether an exception to *Midland* is warranted); *St. Margaret Memorial Hosp. v. N.L.R.B.*, 991 F.2d 1146, 1158 (3d Cir. 1993) (noting in dicta that the *Midland* rule might not be sufficient in all cases); *NLRB v. Affiliated Midwest Hospital*, 789 F.2d 524, 528 n.3 (7th Cir. 1986) (noting that it need not reach the issue of whether the circuit should recognize an exception to *Midland*).

¹⁰² *Florida Mining & Materials Corp.*, 198 NLRB 601, *enfd* 481 F.2d 65 (5th Cir. 1973).

¹⁰³ *Id.*

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Board required employers to provide the union with the names and addresses of employees in the unit.¹⁰⁴ This information is required within seven days of the approval of an election agreement; the Union need not request it.¹⁰⁵ In explaining why it was requiring this information, the Board noted:

. . . [W]e regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede free and reasoned choice. Among the factors that undoubtedly tend to impede such choice is a lack of information with respect to one of the choices available. . . . Accordingly, we think it is appropriate for us to remove the impediment to communication to which our new rule is directed.¹⁰⁶

Thus, the primary justification for the *Excelsior* requirement is presumably to give the union the ability to send materials and other communications to the employees at their home address. There is evidence that unions have taken advantage of the lists for this purpose. In their empirical study of thirty-one union representation elections, Getman, Goldberg and Herman found that employers sent written materials to employees in twenty-six of those elections, while union sent written materials in twenty-five.¹⁰⁷ In these elections, 92 percent of employees reported receiving employer material, while 85 percent reported receiving union material.¹⁰⁸

Although the *Excelsior* decision was designed to facilitate greater information disclosure, in other respects the Board and the courts have

¹⁰⁴ One commentator has proposed that unions be given private employee email addresses as part of the *Excelsior* disclosure. G. Micah Wissinger, *Informing Workers of the Right to Workplace Representation: Reasonably Moving from the Middle of the Highway to the Information Superhighway*, 78 CHI.-KENT L. REV. 331, 342-43 (2003).

¹⁰⁵ *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239-40 (1966).

¹⁰⁶ *Id.* at 1240 (quotations and citations omitted).

¹⁰⁷ JULIUS G. GETMAN ET AL., *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* 90 (1976).

¹⁰⁸ *Id.*

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failed to pursue this goal. There is no structured forum in which the union is given a chance to make its case to employees. If the union wishes to speak with employees, it must do so off-site and outside of working hours. An employer, by contrast, can require employees to attend a meeting in which it presents an anti-union case. Such meetings, known as “captive audience speech,” gives employers a much better opportunity to make their case to employees.¹⁰⁹ In their study of 31 union representation elections, Professors Getman, Goldberg, and Herman found that employers held captive-audience meetings in 28 of those elections, making such meetings more frequent than the distribution of written materials.¹¹⁰ Employee attendance at such meetings was high.¹¹¹ Although unions held off-site meetings in many of the 31 elections, a much smaller percentage of employees reported attending such meetings.¹¹² The authors note that those employees who did attend union meetings were much more likely to be union adherents.¹¹³

Union access to employees even in public places can be restricted by the employer. In *Lechmere, Inc. v. NLRB*,¹¹⁴ the Supreme Court held that employers could prohibit all non-employee solicitation and distribution, including union solicitation, on its retail parking lot. The Court ruled that the employer’s property rights trumped the union’s right to access unless the union could show that the employees could not be reached by other means. The burden of proving such lack of access was a “heavy one,” as there was a presumption that the employees could be reached unless they actually lived on the employer’s property.¹¹⁵ A recent Board decision has

¹⁰⁹ See Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 415 (noting the “obvious point that allowing employers to hold such meetings, especially absent an opportunity for the union to do likewise, gives employers a strong advantage over unions”).

¹¹⁰ GETMAN ET AL., *supra* note JG1, at 90-92.

¹¹¹ *Id.*

¹¹² *Id.* As part of their reforms, Professors Getman, Goldberg and Herman propose that unions be given the opportunity for equal access to employees during working hours if employers use working time for their campaign. *Id.*

¹¹³ *Id.*

¹¹⁴ 502 U.S. 527 (1992).

¹¹⁵ *Id.* at 535, 540. This Board and the courts have permitted union access on employer property for employees working at a remote lumber camp, *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948); in a company town, *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949); and at a fish cannery, *Chugach Alaska Fisheries*, 295 NLRB 44 (1989).

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extended *Lechmere* to allow a grocery store to prohibit nonemployee union organizers from using the snack bar in its store.¹¹⁶

Employers are allowed considerable leeway in restricting the flow of information between employees. Although employees are able to solicit their fellow workers on the job, employers can restrict such solicitations to non-working hours.¹¹⁷ Moreover, the employer may limit employees to oral solicitations in working areas.¹¹⁸ The employer can forbid the distribution of literature in working areas due to the threat of litter and disruption of productive order.¹¹⁹ Such a prohibition must apply to all such distributions, and it must be applied neutrally.¹²⁰ An employer can also extend non-discriminatory literature prohibitions to company bulletin boards¹²¹ and even computer screen savers.¹²² An employer also has the right to prohibit solicitations, including union solicitations, on its own internal e-mail, as long as it does so non-discriminatorily.¹²³

Finally, it is perhaps unnecessary to note that the Board itself takes no role in disseminating information during the representation campaign. One might envision a much more active Board which served as a repository for information about the campaign and took steps to make sure employees received that information. For example, the SEC plays such a role with corporate disclosure: its EDGAR system offers free and simple access to millions of corporate documents regarding IPOs, annual statements, and proxy contests.¹²⁴ The possibility that the NLRB might be able to play a similar role in the representation context will be discussed further below.

D. The Neutrality Agreement: Opting Out of the Board's Process

Any discussion of the representation election would be incomplete without reference to the growing importance of neutrality agreements.

¹¹⁶ *Farm Fresh*, 326 NLRB 997 (1998). For criticism of the *Lechmere* decision, see Cynthia L. Estlund, *Labor, Property, and Sovereignty after Lechmere*, 46 STAN. L. REV. 305 (1994).

¹¹⁷ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

¹¹⁸ *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

¹¹⁹ *Id.*

¹²⁰ *See, e.g., Marathon LeTourneau Co. v. NLRB*, 699 F.2d 248 (5th Cir. 1983) (XXX).

¹²¹ *Honeywell, Inc.*, 262 NLRB 1402 (1982).

¹²² *St. Joseph's Hospital*, 337 NLRB 94 (2001).

¹²³ *E. I. Du Pont De Nemours & Co.*, 311 NLRB 893, 919 (1993).

¹²⁴ *See* SEC Filing & Forms (EDGAR), available at: <http://www.sec.gov/edgar.shtml>.

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The neutrality agreement is a contract between a union and an employer in which the employer agrees to remain neutral while the union endeavors to win the support of a majority of employees. Such agreements come with a range of procedures. The simplest of these agreements only requires employer neutrality during the campaign, with the union then having to succeed in a Board-run election to obtain representation. However, some neutrality agreements also require the employer to recognize the union if it obtains signatures on representation cards from a majority of employees (known as a card-check majority). This stronger form essentially allows the parties to opt out of the NLRB's representation policies. Unions began negotiating neutrality agreements in the 1970s and their popularity has substantially increased. In a survey of four of the nation's biggest unions, James Brudney found that "a plurality or majority of newly organized members have come in through contractual arrangements rather than traditional Board supervised election campaigns."¹²⁵ In fact, Brudney asserts that "[a]s a factual matter, Board elections have ceased to be the dominant mechanism for determining whether employees want union representation."¹²⁶

The attraction of neutrality agreements for unions is clear. A recent study of neutrality agreements found that when such agreements included a card check provision, the union secured representation of the employees 78 percent of the time.¹²⁷ It is less clear why employers would agree to them. In many cases, the employer has a preexisting relationship with the union as to other employees, and it can negotiate a neutrality agreement in the context of a larger series of negotiations.¹²⁸ The most prominent neutrality agreements include ones in the telecommunications and auto

¹²⁵ James Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 829-30 (2005).

¹²⁶ *Id.* at 824.

¹²⁷ Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 52 (2001).

¹²⁸ Adrienne E. Eaton & Jill Kriesky, *Dancing with the Smoke Monster: Employer Motivations for Negotiating Neutrality and Card Check Agreements* (Dec. 2002) (unpublished manuscript), cited in Brudney, *supra* note JB1, at 835; Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 387-89 (2001).

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industries, which have a high union density.¹²⁹ Unions have also had some success in securing neutrality agreements through corporate campaigns.¹³⁰ In addition, some state and local government agencies now require or encourage employers to sign neutrality agreements in order to be eligible for governmental contracts.¹³¹ In Las Vegas, the Hotel and Restaurant Employees (HERE) and the Service Employees International Union (SEIU) have used all three of these factors to support their drive for neutrality agreements to great success.¹³²

Despite their increasing popularity, it is difficult to say how pervasive neutrality agreements may eventually become. Employers who oppose unionization will not sign them voluntarily, and to this point unions have only been able to apply pressure in a limited spectrum of special circumstances. It is possible that these circumstances may increase, but it is also possible that unions have exhausted many of them. In addition, Congress has considered legislation to prohibit employer recognition based on a card-check majority.¹³³ Although it seems unlikely that such a prohibition would pass, the most recent bill did garner fifty-seven co-sponsors. Finally, it is unclear whether the NLRB will accord deference to the results of a card-check certification mandated by a neutrality agreement. In a recent order, the Board granted review of a case involving the application of the “recognition bar” doctrine in the context

¹²⁹ See, e.g., Rick Haglund, *Union Foes Declare War on Neutrality Agreements*, GRAND RAPIDS PRESS, Feb. 20, 2005, at G5 (discussing neutrality agreement within the automobile industry); Matt Richtel, *In Wireless World, Cingular Bucks the Antiunion Trend*, N.Y. TIMES, Feb. 21, 2006, at C1 (discussing neutrality agreements at Cingular and SBC Communications).

¹³⁰ Eric Heubeck, *New Organizing Methods: Card Check and Neutrality Agreements* (Nov. 29, 1999), available at: <http://www.enterstageright.com/archive/articles/1299unorg.htm> (discussing various corporate campaigns).

¹³¹ See Brudney, *supra* note JB1, at 838 & n.85 (discussing laws, resolutions, or executive orders in California, New Jersey, Milwaukee, and San Jose); Hartley, *supra* note RH1, at 392-95.

¹³² Steven Greenhouse, *Local 226, “The Culinary” Makes Las Vegas the Land of the Living Wage*, N.Y. TIMES, June 3, 2004, at A22; Labor Research Association, *Employer Neutrality and Card Check Recognition Get Results* (October 1999), available at: <http://www.laborresearch.org/story2.php/67>.

¹³³ See Secret Ballot Protection Act of 2004, H.R. 4343, 108th Cong. § 3 (2004); H.R. 4636, 107th Cong. § 2 (2002).

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of a neutrality agreement.¹³⁴ The Board has traditionally recognized that “voluntary recognition of a union in good faith based on demonstrated majority status will bar a petition for a reasonable period of time.”¹³⁵ However, the majority in *Dana* distinguished the traditional rule by noting that such precedent “is based upon a union's obtaining signed authorization cards from a majority of the unit employees before entering into the agreement with an employer, while in both of the instant cases, an agreement was reached between the union and the employer before authorization cards, evidencing the majority status, were obtained.”¹³⁶ Although it only granted review on the issue and made no final determination, the order still generated a strong dissent.¹³⁷ If the Board ultimately disallows the recognition bar in the card-check neutrality agreement context, then employers and employees will be free to file decertification petitions soon after the employer has recognized the union through the card-check process.¹³⁸

The strongest argument against neutrality agreement is the potential impairment of employee free choice. Anti-union organizations and commentators have criticized neutrality agreements as opportunities for union intimidation and misinformation to carry the day.¹³⁹ Critics of

¹³⁴ *Dana Corp.*, 341 N.L.R.B. No. 150, 2004 WL 1329345 (June 7, 2004).

¹³⁵ *See id.* at *3 (Liebman & Walsh, Mems., dissenting) (citing *Keller Plastics Eastern, Inc.*, 157 N.L.R.B. 583 (1966); *Sound Contractors Assn.*, 162 N.L.R.B. 364 (1966)).

¹³⁶ *Id.* at *1.

¹³⁷ *See id.* at *2 -*8 (Liebman & Walsh, Mems., dissenting).

¹³⁸ However, it may be possible for union to enforce neutrality agreements through mandatory arbitration, which in turn would be enforced by federal courts under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). *See UAW v. Dana Corp.*, 278 F.3d 548, 550 (6th Cir. 2002); *AK Steel Corp. v. United Steelworkers*, 163 F.3d 403, 406 (6th Cir. 1998); *Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 568 (2d Cir. 1993). Arbitrators generally have flexibility in crafting remedies for neutrality breaches. *See AK Steel Corp.*, 163 F.3d at 410.

¹³⁹ *See, e.g.,* Compulsory Union Dues and Corporate Campaigns: Hearings on H.R. 4636 Before the Subcomm. On Workforce Prots. Of the House Comm. On Educ. & the Workforce, 107th Cong. 100 (2002) [hereinafter 2002 House Hearings] (statement of Charles I. Cohen on Oct. 8, 2002) (arguing that the “ultimate goal” of a card-check neutrality agreement is “obtaining representation status without a full informed electorate and without a secret ballot election”); Union Free America, *Neutrality Agreements and Card Check Elections*, available at: http://www.unionfreeamerica.com/neutrality_cardcheck.htm (“The long and short of it is that union authorization cards signed by a majority of employees are not a reliable

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card-check neutrality agreements have cited the lack of a “fully informed electorate”¹⁴⁰ under such agreements as well as the need for employees to “hear[] views on as many sides of the issue as possible.”¹⁴¹ The NLRB itself echoed these concerns when it said that “the fact remains that the secret-ballot election remains the best method for determining whether employees desire union representation.”¹⁴² As I will discuss later,¹⁴³ required disclosure in the context of a representation decision, whether it be a card check or a secret-ballot election, would alleviate many of the concerns raised by such procedures while preserving the features that make them attractive to unions and their proponents.

PART II: CRITICAL APPROACHES TO THE BOARD’S REPRESENTATION CAMPAIGN REGULATION

As others have noted in the past, there has been few prominent works of legal scholarship on the regulation of the union representation campaign.¹⁴⁴ The four primary works can be broken down by decade: Derek Bok in the 1960s,¹⁴⁵ Julius Getman, along with Stephen Goldberg and Jeanne Herman, in the 1970s,¹⁴⁶ Paul Weiler in the 1980s,¹⁴⁷ and Craig Becker in the 1990s.¹⁴⁸ Although each of these works has its own focus, they sound primarily on two themes. Bok and Getman focus on the administrative delay and inefficiency caused by the Board’s regulation of the labor campaign, while Weiler and Becker focus on employer campaign coercion that manages to survive Board regulation and defeat the free will of employees. These articles, and their proposed reforms, are discussed below.

indication of whether they really want union representation. The unions know this. That's why they want card check elections instead of secret ballot elections.”).

¹⁴⁰ 2002 House Hearings, *supra* note HH2002, at 100 (statement of Charles I. Cohen).

¹⁴¹ 2002 House Hearings, *supra* note HH2002, at 105 (statement of Daniel Yager).

¹⁴² Dana Corp., 341 N.L.R.B. No. 150, 2004 WL 1329345 at *1 (June 7, 2004).

¹⁴³ *See infra* Part IV.

¹⁴⁴ Becker, *supra* note CB1, at 497.

¹⁴⁵ Bok, *supra* note DB1.

¹⁴⁶ GETMAN ET AL., *supra* note JG1.

¹⁴⁷ Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

¹⁴⁸ Becker, *supra* note CB1.

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A. The Problem of Bureaucratic Obstruction: Derek Bok and Julius Getman et al.

Derek Bok is one of the most important labor law scholars of the past century. Prior to becoming the president of Harvard University, Bok wrote a number of foundational articles at a time when labor law, as both a practical and academic subject, was at the peak of its own importance.¹⁴⁹ Bok's vision of labor law shared many commonalities with another labor law giant, Julius Getman. An author of books and articles critical to the labor law pantheon, Getman shared Bok's concern with administrative efficiency in the face of a growing bureaucracy. While supportive of the labor movement, both men might be better characterized as centrists in their approach to labor policy.

One of Bok's most important articles was directly on the issue of the regulation of union representation elections.¹⁵⁰ Bok's approach to the issue centered on what he saw as the "instability" and "[i]nconsistencies" of the Board's doctrine in the area.¹⁵¹ Bok felt that the inconsistencies reflected "a deeper uncertainty regarding the nature of the election process itself."¹⁵² Bok also noted that in trying to keep the election campaign process free of coercion, the Board relied on inferences about human behavior that may or may not be supportable.¹⁵³ He claimed that if the Board's only guiding principle was to keep employee free from undue interference, the Board's regulatory approach would continue to be incoherent and unstable.¹⁵⁴ Instead, Bok argued that the Board should focus on a set of "legitimate interests" held by the parties involved.¹⁵⁵

The first "legitimate interest" discussed by Bok is that of free choice. In this regard, he stated:

We may assume that one basic purpose of an election is to permit the voters to make as rational, and hence as accurate, a decision as they can concerning the issue before them. In the context of a representation election, a rational

¹⁴⁹ Bok, *supra* note DB1; Derek C. Bok, *Reflections on the Distinctive Character of American Labor Law*, 84 HARV. L. REV. 1394 (1971).

¹⁵⁰ Bok, *supra* note DB1.

¹⁵¹ *Id.* at 39.

¹⁵² *Id.* at 40.

¹⁵³ *Id.* at 40-41.

¹⁵⁴ *Id.* at 43, 45.

¹⁵⁵ *Id.* at 43.

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decision implies that employees have access to relevant information, that they use this data to determine the possible consequences of selecting or rejecting the union, and that they appraise these possibilities in light of their own values and desires to determine whether a vote for the union promises to promote or impair their interests.¹⁵⁶

Bok's description of an employee exercising free choice describes the same process envisioned by law and economics models when rational actors are making cost-benefit decisions about economic choices. After setting up this model, however, he immediately expressed skepticism about its correlation with reality. Citing to works about the irrationality of decisions made in political elections, Bok acknowledged that perhaps the union representation decision is more suited to rational choice.¹⁵⁷ But in the end, Bok believed there was little role for law in making the process more rational.

Bok arrived at this conclusion by breaking down an employee's union representation decision into three questions: (1) Are conditions within the plant satisfactory? (2) To what extent can the union improve on these conditions? (3) Will representation by the union bring countervailing disadvantages as a result of dues payments, strikes, or bitterness within the plant?¹⁵⁸ While employees may be "best equipped" to answer the first question, according to Bok, studies showed that employees misconceive the nature of their problems and may transfer concerns about other issues into an irrational focus on wages.¹⁵⁹ As to the second question, Bok believed that the employee would be "hard pressed to decide to what extent a union can improve upon the situation."¹⁶⁰ Bok discussed how claims by the union about improvements at other companies would be rebutted by the employer in ways that employees would be "in a poor position to resolve."¹⁶¹ Regarding the third question, Bok argued that employees would be "particularly handicapped" in resolving this issue, as

¹⁵⁶ *Id.* at 46.

¹⁵⁷ *Id.* at 48.

¹⁵⁸ *Id.* at 49.

¹⁵⁹ *Id.* (citing BURLEIGH B. GARDNER & DAVID G. MOORE, HUMAN RELATIONS IN INDUSTRY (4th ed. 1964); F.J. ROETHLISBERGER & WILLIAM J. DICKSON, MANAGEMENT AND THE WORKER (1939)).

¹⁶⁰ Bok, *supra* note DB1, at 49.

¹⁶¹ *Id.* at 50.

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the answer depended on resolving a series of sub-issues for which there would often be “little evidence beyond partisan statements of employers and organizers and the anecdotal accounts of associates”¹⁶²

Bok thus made clear that he believed informational difficulties stood in the way of employees making rational representation decisions. As Bok noted, employees generally have little direct, personal information about the union, and there is little such information or analysis in the media and other independent sources. Given the lack of information on the critical questions posed by Bok, he argued that employees were not making rational economic decisions by sifting the evidence, but rather were basing their votes on factors irrelevant to a rational determination. As catalogued by Bok, such factors could include: the skillfulness of the union’s organizing strategy, the employer’s response to the organizing drive, the “likability” of both union and employer representatives, the opinions of certain “key employees” within the plant, community opinion of unions generally, and the background and past experiences of each employee.¹⁶³ But ultimately, Bok concluded there was no rational economic calculus behind these elections.

Bok acknowledged that given the informational disparities, it might make more sense for government to play a more invasive role in the regulation of campaign information.¹⁶⁴ However, Bok rejected this conclusion. He concluded, first, that there are insufficient grounds for determining what kinds of regulation might actually assist in making more rational determinations.¹⁶⁵ More importantly, however, Bok also believed that “[w]hen employees are unable to form a reasoned judgment on the effects of a union, given the complexity of the issues and the limited information at their disposal, no legal rule can lead them to a rational conclusion.”¹⁶⁶ He thus concluded that efforts in this regard were doomed to failure – and thus, beyond a very limited extent, not worth pursuing in the first place.¹⁶⁷

¹⁶² *Id.*

¹⁶³ *Id.* at 51.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 52.

¹⁶⁶ *Id.*

¹⁶⁷ Bok did note that prohibitions on “flagrant intimidation” would be a simple and necessary step to prevent rampant coercion. *Id.* at 52-53. However, earlier in the article Bok had noted that flagrant intimidation such as discharge of union leaders can also backfire on an employer, rallying employees to the union cause. *Id.* at 41.

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This vision of government inadequacy ultimately led Bok to envision a much more limited role for the NLRB in regulating representation campaigns. If employees are doomed to irrational choices, why spend time and money in an effort to establish pristine laboratory conditions? There is a contradiction here, which Bok recognized at various points in the paper: if such decisions are based on irrational factors, then even more of an effort should be made to remove improper or misleading campaign activities that may sway an employee's final decision.¹⁶⁸ But Bok believed that the factors that compel most employees' decisions are established at the onset of the campaign, if not before.¹⁶⁹ Thus, he ultimately sees the campaign as unimportant, and campaign regulation as a procedural hurdle to be minimized.¹⁷⁰ Ultimately, it is the goal of administrative efficiency that Bok set as his polestar for his inquiry.

Although Bok thus rejected overall efforts to improve the rationality of employee choice, he did use the argument to support policy changes when such changes also would improve administrative efficiency. In arguing that inflammatory speech should not be regulated, Bok cited to a psychological study finding that calm and rational arguments were more persuasive than emotional entreaties.¹⁷¹ Bok lauded the informational value of employer predictions about high dues and frequent strikes, noting "[t]he costs that might result from strikes and dues payments are clearly legitimate factors to be weighed by employees."¹⁷² Similarly, Bok argued that employers should be free to grant benefits to employees in the midst of a campaign, not only because rational employees can discount the effect of such "bribes," but also because such conduct provides further information about the two alternatives open to employees.¹⁷³ Even misrepresentations or misleading remarks need not be policed if the other side is given an adequate opportunity to respond, thus increasing the

¹⁶⁸ *Id.* at 51, 73, 81, 84.

¹⁶⁹ *Id.* at 88-90.

¹⁷⁰ *Id.* at 62, 66.

¹⁷¹ *Id.* at 72 (citing Irving L. Janis & Seymour Feshbach, *Effects of Fear-Arousing Communications*, 48 J. ABNORMAL & SOC. PSYCH. 78 (1953)).

¹⁷² *Id.* at 79. *See also id.* at 80-81 (noting an employer's threat to bargain aggressively "may well convey an accurate impression of what is in store if a union is selected").

¹⁷³ *Id.* at 113-15. *See also id.* at 117-18 (arguing in favor of early recognition and agreements, as "employees are free to evaluate the agreement, weigh its terms against those negotiated elsewhere by the rival organization, and consider the arguments of the opposing union that even greater benefits will result under its leadership").

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information available to employees.¹⁷⁴ In this vein, Bok also noted a union's lack of access to names and addresses as an obstacle in the process, and argued that the employer should be required to provide such information once the bargaining unit had been determined.¹⁷⁵

In the end, Bok's perspective offers a complicated and, I venture, contradictory set of perspectives and policy suggestions on the NLRB's regulation of the union representation election. He seemed to recognize the need to strong efforts against employer reprisals, noting in the conclusion that "an elemental fear of reprisal still poses the major threat to the free and fair elections contemplated by the act."¹⁷⁶ However, Bok was fairly nihilistic about efforts to truly effectuate rational employee choice, and his main concern is instead cutting down on bureaucratic interventions that delay the ultimate disposition of the election. Although such a viewpoint supports his policy recommendations, it was hard for Bok to completely retreat from a rational actor model, and he ended up falling back onto it for support. In the end, Bok's prescription is superficially compelling but somewhat incoherent: he advocates a drastic cutback in regulation but seems unwilling to acknowledge any detrimental effects to such a cutback.

Twelve years later, Bok would write the forward to *Union Representation Elections: Law and Reality* by Julius Getman, Stephen Goldberg, and Jeanne Herman. The book essentially summarized a large-scale empirical investigation into the decisions made during a union representation election. Putting the book into context, Bok wrote:

Earlier writers had seriously questioned the government's policy of establishing detailed election rules to protect employee free choice from a long list of questionable campaign practices What Getman, Goldberg, and Herman have done is investigate the voting behavior of employees in a large number of elections to determine whether the Labor Board rules are really needed to guarantee a free and uncoerced choice. Unlike many empirical studies, their work arrives at clearcut conclusions

¹⁷⁴ *Id.* at 91-92.

¹⁷⁵ *Id.* at 99.

¹⁷⁶ *Id.* at 140.

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that make a massive attack on the assumptions that support an entire body of regulatory law.¹⁷⁷

The Getman et al. study did what Bok claimed it did: namely, provide an argument based on empirical data against most of the Board's regulation of the representation campaign. The book begins by noting that the Board bases its regulation on assumptions about human behavior untested by research. The authors note that the Board's model of voting behavior is based on the "free and reasoned choice" approach, and then provides a list of behavioral "assumptions" the Board makes about employees: they are attentive to the campaign, they will interpret ambiguous statements by the employer as threats or promises, they are unsophisticated about labor relations, their free choice is fragile, and that the decision to sign or not sign a representation card is representative of employee support for the union.¹⁷⁸ The purpose of the Getman et al. study was to test these assumptions against data taken from actual representation elections.

In a study remarkable for its breadth as well as for the administrative hurdles it overcame, the authors examined thirty-one union representation elections between 1972 and 1973.¹⁷⁹ The authors orchestrated interviews of 1,239 employees who participated in these elections.¹⁸⁰ The interviews were conducted in two waves; first, as soon as possible after the NLRB directed an election to take place, and then again after the election.¹⁸¹ In the first wave, interviewers sought to assess the employee's pre-campaign sentiments about union representation, their own working conditions, and how they intended to vote.¹⁸² In the second wave, employees were asked how and why they voted as well as what they remembered from the representation campaign.¹⁸³ The authors then analyzed the results to

¹⁷⁷ GETMAN ET AL., *supra* note JG1, at xi.

¹⁷⁸ *Id.* at 7-21.

¹⁷⁹ *Id.* at 33. In order to get employees' names and contact information for use in the study, the authors had to file a Freedom of Information Act claim against the Board. *Id.* at 36-37. The Board refused to provide the information until compelled by the United States Court of Appeals for the D.C. Circuit. *Id.*

¹⁸⁰ *Id.* at 33.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

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determine what factors went into employees' voting decisions, including the effects of employer and union campaign efforts.

The headline for the study is that the votes of 81 percent of the employees could be predicted from their pre-campaign attitudes about their job and about unions.¹⁸⁴ The study also found that employees who had an intent to vote a particular way prior to the campaign generally ended up voting that way: 94 percent of employees intending to vote for the company did so, as did 82 percent of those intending to vote for the union.¹⁸⁵ The authors were able to predict the outcome of 29 out of the 31 elections based on how employees intended to vote.¹⁸⁶ According to Getman and his coauthors, these results disprove the Board's assumption that free choice is fragile and employees will be easily influenced by the campaign. However, the authors also admit that 19 percent of employees were initially undecided (six percent) or voted contrary to their original intent (13 percent), and that the votes of this 19 percent were necessary for victory in nine out of the 31 elections.¹⁸⁷ Of these groups, 76 percent of the switchers and 68 percent of the undecided voters ended up voting for the company.¹⁸⁸

Getman, Goldberg, and Herman also studied to what extent employees could remember aspects of the union's and employer's campaigns and the salience of campaign issues to the employee vote. According to their study, employees recalled an average of three company campaign issues and two to three union campaign issues at the end of the campaign.¹⁸⁹ Since the authors determined that there were around 25 to 30 issues each in the union and employer campaigns, they concluded that the roughly 10 percent recognition percentage displayed a "low level of familiarity" with the campaign process.¹⁹⁰ Ten of the issues raised by companies had a 20 percent or higher recognition rate, but none had higher than 40 percent.¹⁹¹ The most recognized issue was "improvement not dependent on unionization," followed by "new company/management recently taken over" and "plant closing/moving

¹⁸⁴ *Id.* at 62.

¹⁸⁵ *Id.* at 64.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 103.

¹⁸⁸ *Id.* at 111.

¹⁸⁹ *Id.* at 76.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 78.

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may follow unionization.”¹⁹² Union issues fared substantially better at the top: “wages unsatisfactory; union will improve” was recognized by 71 percent of employees, while 64 percent recognized “union will prevent unfairness, set up grievance procedure/seniority system.”¹⁹³ However, only six of the twenty-five union issues were recognized by more than 20 percent of respondents.¹⁹⁴

Getman and his coauthors also found that several factors corresponded with campaign familiarity. Union supporters were generally more informed about both campaigns. More union voters (47 percent) reported employer discussion of the potential for job loss stemming from a union victory than company workers (24 percent).¹⁹⁵ Union supporters were also much more likely to attend union meetings, and such attendance was strongly correlated with familiarity.¹⁹⁶ However, 83 percent of employees attended company meetings, while only 36 percent of employees attended union meetings.¹⁹⁷ Exposure to written campaign material also contributed significantly to familiarity; employees who received campaign literature recalled roughly double the number of issues than those who did not.¹⁹⁸

The study also found a high correspondence between reasons for the employees’ votes and campaign issues in those elections. According to the study, 84 percent of the reasons given by union voters and 71 percent of the reasons given by voters against the union were issues raised in the preceding campaign.¹⁹⁹ However, the authors found no corresponding relationship between election success and campaign characteristics.²⁰⁰ The study did find that the subset of employees who switched their votes from intending to vote for the company to a union vote, or who went from undecided to a union vote, recalled significantly more about the union campaign.²⁰¹ The authors believed that this result was explained by the high level of attendance at union meetings by employees in these

¹⁹² *Id.*

¹⁹³ *Id.* at 80.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 87-88.

¹⁹⁶ *Id.* at 91

¹⁹⁷ *Id.* at 96.

¹⁹⁸ *Id.* at 89-90.

¹⁹⁹ *Id.* at 97.

²⁰⁰ *Id.* at 101.

²⁰¹ *Id.* at 103.

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groups.²⁰² However, the authors could not determine the causal relationship between switch, familiarity, and attendance at union meetings.²⁰³ Undecideds and switchers who voted for the company were not significantly more familiar with the company's campaign.²⁰⁴

The authors also specifically examined the effects of unlawful employer campaigning on representation election results. The study found that employers had engaged in unlawful campaigning in 22 out of the 31 elections.²⁰⁵ In nine of those elections, the employer committed campaign violations serious enough to warrant a bargaining order.²⁰⁶ Despite this high level of misconduct, however, the study found generally no correlation between voting behavior and this illegal activity. While noting that employees who signed union cards did in fact vote in significantly higher numbers against the union in elections marred by unlawful campaigning, the authors detected no such effects on employees who were undecided, employees who intended to vote for the union, or employees whose prior attitudes predicted a union vote.²⁰⁷ Even the firing of union supporters did not result in a significant change in voting behavior.²⁰⁸

Based on these results, Getman, Goldberg, and Herman argued for a serious overhaul in the Board's regulation of representation campaigns. Since 81 percent of employees voted according to their pre-election attitudes about working conditions and unions, the authors believed that the importance of the pre-elections campaign was seriously overblown. This conclusion was supported by the authors' findings that employees remembered only a small percentage of issues from the campaign and, therefore, were "not generally attentive to the campaign."²⁰⁹ Interestingly, they state the following about employee "rationality" with regard to the campaign:

The fact that employees do not pay close attention to the campaign does not mean that the voting decision is

²⁰² *Id.* at 104-05.

²⁰³ *Id.* at 105-06.

²⁰⁴ *Id.* at 108.

²⁰⁵ *Id.* at 111-13.

²⁰⁶ *Id.* at 113.

²⁰⁷ *Id.* at 115-16.

²⁰⁸ *Id.* at 125-26.

²⁰⁹ *Id.* at 140.

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irrational. An employee who votes consistently with his pre-campaign attitudes is acting in a wholly rational manner. His choice, to be sure, may not be reasoned in the sense in which the Board contemplates – based on a careful weighing of the campaign arguments put forth by each party – but that does not make it any less rational.²¹⁰

The authors are thus largely in the “predestination” camp: the campaign will not affect the way most voters vote. Even employer attempts at coercion seem to have no effect on voting patterns. Given these findings, the authors argue that the Board should drastically cut back on its regulation of representation elections. Campaign speech, according to the authors, “should be as free of governmental restraint as speech in political elections.”²¹¹ As the authors note, “[b]oth the employee voter and the political voter appear less interested in the campaign than traditional theory would have it, but that, if anything, suggests less need for governmental regulation of speech, not more.”²¹² Grants of benefits should be allowed.²¹³ Bargaining orders should be rare, as the election result, even if tainted, is likely to reflect the wishes of employees.²¹⁴ However, the authors do depart from this “hands-off” model in several instances. Even the authors cannot fully ascribe to their findings that severe employer illegality has little effect on campaigns. They recommend harsher penalties, such as treble damages, for illegal discharges during the campaign.²¹⁵ And they argue in favor of equal opportunities for unions and employers to address the workers during work time on employer premises. Noting the employer’s significant advantage in communicating with employees, the authors argue that “an employer who holds campaign meetings on working time and premises should be required to allow the union (or unions) to hold such meetings on working time and premises.”²¹⁶ Comparing the election again to the political process, the authors state: “It is fundamental to the democratic

²¹⁰ *Id.* at 143.

²¹¹ *Id.* at 150.

²¹² *Id.* at 150.

²¹³ *Id.* at 151.

²¹⁴ *Id.* at 153-56.

²¹⁵ *Id.* at 155-56.

²¹⁶ *Id.* at 157.

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process that each party should have a roughly equal opportunity to communicate with the electorate, regardless of the effectiveness of that communication.”²¹⁷ The authors similarly praise the Board’s *Excelsior* requirements for their facilitation of access.²¹⁸

Getman, Goldberg, and Herman’s study was primarily criticized for its failure to blame employer coercion for the decreasing rate of private-employee unionization.²¹⁹ As commentators pointed out, many of the statistics heralded by the authors as proof of campaign irrelevance could be read much more ambiguously.²²⁰ In fact, according to one reading of the study’s data, the study shows that unions would have won 46% to 47% of elections if they had been entirely free from illegal behavior, and 3% to 10% if the employers had campaigned at the highest level of illegality shown in the study.²²¹ However, as will be discussed below, these critics do not generally quarrel with the study’s efforts to minimize the length or importance of the campaign. Although the Board initially relied on the study in changing its misrepresentation jurisprudence in *Shopping Kart*, the Board later rejected these findings when it reversed course in *General Knit*.²²² When the Board subsequently changed back to the *Shopping Kart* rule, it failed to cite the study as grounds for doing so.²²³ Recent efforts to use the study before the Board have not met with success.²²⁴

²¹⁷ *Id.*

²¹⁸ *Id.* at 159 n.39.

²¹⁹ See, e.g., Patricia Eames, *An Analysis of the Union Voting Study from a Trade-Unionist’s Point of View*, 28 STAN. L. REV. 1181, 1182 (1976); Weiler, *supra* note PW1, at 1782.

²²⁰ Eames, *supra* note PE1, at 1183-87; Weiler, *supra* note PW1, at 1782-86.

²²¹ Weiler, *supra* note PW1, at 1786. In making this assertion, Weiler relied on an unpublished Ph.D. dissertation by William Dickens. See *id.* (citing William Dickens, *Union Representation Elections: Campaign and Vote* (1980)). Dickens’ dissertation was published in edited form as William Dickens, *The Effects of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560 (1983). Getman and Goldberg, along with a new co-author, responded to Weiler’s article as well as the Dickens’ analysis in Stephen B. Goldberg, Julius G. Getman & Jeanne M. Brett, *The Relationship between Free Choice and Labor Board Doctrine: Differing Empirical Approaches*, 79 NW. U. L. REV. 721 (1984).

²²² See *General Knit*, 239 NLRB at 621-22.

²²³ See generally *Midland Nat’l Life Ins. Co.*, 263 NLRB 127 (1982).

²²⁴ See *Overnite Transp. Co.*, 323 NLRB 990, 1999 WL 1036568 at *50 n.34 (noting that respondent’s reliance on the study was “undermined” by the Board’s decision in

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B. The Problem of Employer Coercion: Paul Weiler and Craig Becker

Paul Weiler came to Harvard Law School in 1981 after extensive experience with the Canadian system of labor relations.²²⁵ In a groundbreaking series of articles, Weiler argued for a new framework for U.S. labor law, based primarily on the Canadian model.²²⁶ In his first article, Weiler developed an alternative model for the certification of unions as collective employee representatives.²²⁷

Weiler's central premise was that the steady decline in union representation results (at least in substantial part) from a marked increase in employer coercion and illegal tactics directed at union campaigns and supporters. To prove this point, Weiler relied on statistics about two general trends. First, Weiler noted that the rate of union victories in representation campaigns dropped from 74% in 1950 to 48% in 1980.²²⁸ At the same time, the number of unfair labor practice claims filed against employers rose from 4,472 in 1950 to 31,281 in 1980, with the percentage of meritorious claims rising slightly.²²⁹ Putting these two trends together, Weiler argued that the decrease in union representation is correlated with the increase in employer unfair labor practices. For further proof, Weiler compared the U.S. data with Canadian data, which had roughly three times the rate of increasing union density from new union certifications, as well as one-sixth the number of discriminatory discharge complaints per election.²³⁰

Weiler blamed the increasing influence of employer coercion for the declining rates of U.S. unionization. According to Weiler, weak remedies for unfair labor practices, combined with lengthy delays in the

General Knit), overruled in part on different grounds by *Overnite Transp. Co. v. NLRB*, 280 F.3d 417 (4th Cir. 2002).

²²⁵ Weiler served as Chairman of the Labour Relations Board of British Columbia from 1974 to 1978 and helped author sections of British Columbia's labor provisions. Weiler, *supra* note PW1, at 1806 n.135.

²²⁶ list articles

²²⁷ Weiler, *supra* note PW1.

²²⁸ Weiler, *supra* note PW1, at 1776.

²²⁹ *Id.* at 1780.

²³⁰ *Id.* at 1817. In 1980, the annual increase in union density produced by newly certified units was 0.24% in the United States, compared with 0.72% in Ontario and 0.84% in British Columbia. The ratio of discriminatory discharges to per representation campaign was 2.5 in the United States, but only 0.4 in Ontario and 0.1 in British Columbia. *Id.*

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representation and remediation process, encouraged an atmosphere of employer coercion and lawbreaking. In order to stem the tide of this illegal campaigning, Weiler argued not for greater penalties, but instead for the elimination of the campaign process itself. Instead of a two-month campaign between initial filing and actual election, Weiler advocated for an “instant” (five days or less) election.²³¹ Such a brief period would prevent employers from sustaining prolonged campaign offenses replete with unfair labor practices and other tactics of intimidation.²³²

Weiler acknowledged that the purpose of a union representation system is “to nurture and protect employee freedom of choice with respect to collective bargaining.”²³³ However, Weiler argued that the U.S. model overplays the significance of the union to employees by treating the union as “a quasi-governmental authority over the employees.”²³⁴ By allowing the employer to participate in the campaign during a substantial period of time, the NLRA had in effect stated that “the employer is legitimately entitled to play the same role in a representation campaign against the union that the Republican Party plays in a political campaign against the Democrats.”²³⁵ As Weiler argued, this is strange – the union is seeking to represent employees in their relationship with the employer, in a context in which employees and employers often have adverse interests.²³⁶ A more apt analogy, according to Weiler, would be allowing foreign governments to have a role in our political campaigns.²³⁷ If anything, this is too weak; perhaps a better analogy would be allowing your spouse to have a say in who you hire as your divorce attorney.

Weiler did recognize “one final defense” for proponents of the current system: namely, the election campaign as “an aid to informed employee choice.”²³⁸ The employer serves as a proxy supporter for those employees who do not support the union and provides them with resources, arguments, and organization.²³⁹ Weiler was not persuaded,

²³¹ Weiler, *supra* note PW1, at 1770, 1820-22.

²³² *Id.* at 1812.

²³³ *Id.* at 1808.

²³⁴ *Id.* at 1809.

²³⁵ *Id.* at 1813.

²³⁶ *Id.* at 1813.

²³⁷ *Id.* at 1814.

²³⁸ *Id.* at 1815.

²³⁹ *Id.*

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however, based on his analysis of the costs and benefits to such a system. He believed that the employer had a fair opportunity to make its case prior to the representation election; that U.S. workers were not unsophisticated about unions; and that employers would have a chance to make their case about working conditions during negotiations with the union.²⁴⁰ Weiler concluded: “The contribution made by the election campaign to the enlightenment of the employees is marginal at best.”²⁴¹

In 1993, Craig Becker built upon Weiler’s criticism of the political model for union representation campaigns. According to Becker, the conception of the union election as a contest between employer and unions had “subverted labor’s right to representation.”²⁴² Employers were not competing against unions in a neutral election, but rather attempting to influence an election in an arena where they help ultimate power.²⁴³ Delving into Wagner Act legislative history as well as early Board decisions, Becker developed how the democratic political campaign had become the “legitimizing metaphor” for the Wagner Act and collective bargaining more generally.²⁴⁴ However, early Board decisions had not required a secret-ballot election in determining representation and, more importantly, had held that the employer had no role to play in the campaign process.²⁴⁵ It was not until the Supreme Court and the Taft-Hartley Act intervened that the Board was required to have secret-ballot elections and provide the employer with the right to present its case, as long as it made no threats or bribes.²⁴⁶

Once the electoral model was imposed on the representation campaign, the Board’s regulation of the process vacillated between a *laissez-faire* political model and the much stricter laboratory conditions model.²⁴⁷ The laboratory conditions model is thus seen as a response to the employer’s new role: in order to restrain the effects of employer participation, the Board needed to lay down strict requirements on electioneering. The contradiction between laboratory conditions and

²⁴⁰ *Id.* at 1815-16.

²⁴¹ *Id.* at 1816.

²⁴² Becker, *supra* note CB1, at 497.

²⁴³ *Id.* at 523-47.

²⁴⁴ *Id.* at 501-23.

²⁴⁵ *Id.* at 535-40 (discussing American Tube Bending Co., 44 N.L.R.B. 121 (1942), enforcement denied, 134 F.2d 993 (2d Cir.)).

²⁴⁶ 29 U.S.C. §§ 128(c), 129; Thomas v. Collins, 323 U.S. 516 (1945).

²⁴⁷ Becker, *supra* note CB1, at 547-48.

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political democracy, however, is manifest. Commentators have criticized Board regulations based on the dissonance between these concepts.²⁴⁸ But as Becker pointed out, the political analogy itself is inapt. The answer, according to Becker, is not to embrace the freewheeling regulation of the political model, as suggested by Bok and Getman et al., but rather to get rid of the political analogy and its trappings.²⁴⁹ Becker's prescription is to strip employers of "any legally cognizable interest in their employees' election of representatives."²⁵⁰

What exactly would this mean? Becker did not propose that employers must remain neutral during representation campaigns. Instead, he argued that employers should not have any official role in the election process. Thus, employers would have no grounds to contest the unit or otherwise participate in representation hearings.²⁵¹ Employers would not have the right to challenge elections or voters, and thus would not have the right to place observers at the polls.²⁵² More generally, campaign rules would attempt to prevent employers from "exploiting their singular economic power to persuade employees."²⁵³ Thus, employers would not be permitted to host any "captive audience" campaign presentations.²⁵⁴ They would be bound to follow the rules on solicitation and distribution that they laid down for union representatives.²⁵⁵ Although Becker's proposal thus seems to allow for employer speech as long as similar opportunities are offered to the union, he did state that "[i]t is but a short step to the realization that all employer speech to employees during working hours, at the workplace, is speech to a captive audience."²⁵⁶

Becker's rhetoric is firmly set against any participation by the employer in representation campaigns. But his proposed solution allows employers to continue to have a role in the election process, albeit a non-legally-sanctioned one. It is not clear why, if employers have no legitimate interests in the process, Becker was not willing to return to the Board's prior employer-neutrality requirement. Perhaps his proposal is

²⁴⁸ GETMAN ET AL., *supra* note JG1, at 157; Bok, *supra* note DB1, at 68.

²⁴⁹ Becker, *supra* note CB1, at 577-85.

²⁵⁰ *Id.* at 500.

²⁵¹ *Id.* at 586-87.

²⁵² *Id.* at 586.

²⁵³ *Id.* at 592.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 600.

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based primarily on practical considerations, since he emphasized that it could be achieved “with almost no alteration of the statutory framework.”²⁵⁷ But it seems unrealistic to expect that employers will have a substantially reduced role in the campaign merely because they can no longer officially intervene.

I believe that Becker may have been hung up by the same concerns that befuddled Bok as well as Getman. While acknowledging the disfunctionality of the election process, these commentators seem reluctant to completely eliminate the representation campaign. Even though Becker persuasively deconstructed the political electioneering model as applied in this context, he could not quite argue for a wholesale elimination of it. Perhaps Becker was merely working within what he felt were the politically realistic constraints at the time. But Becker’s reforms recognize, despite his rhetoric, that the employer may in fact have a continuing role to play within the campaign. It is hard to reconcile this continuing role based on the powerful problems, as he and Paul Weiler set forth, caused by continued engagement.

C. Past Reforms and the Problem of the Rational Actor

As discussed above, there have been two distinct reformist approaches to the union representation election. The Bok-Getman approach believes that the NLRB has swamped the process with a flood of complicated regulations. Believing that most employees have already made up their minds, they place little stock in the pre-election campaign. Although they acknowledge that employer coercion may have ill effects on pro-union sentiment, they argue that overall the effects are not that important. Their reforms focus on cutting down the red tape that entangles the post-election process, in order to secure election results more quickly and enable participants to settle in to the post-election reality. The Weiler-Becker approach, on the other hand, believes that the effects of employer coercion and disapproval during the election campaign are incredibly important. They argue that employer participation in representation campaigns allows employers to cow their employees through legal and illegal means. By using coercion, threats, and even simple disapproval, employers can significantly reduce employee support and enthusiasm for union representation, resulting in

²⁵⁷ *Id.* at 585.

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fizzled campaigns and lost elections. Weiler and Becker both acknowledge a role for the representation campaign, but they believe that employers' roles in those campaigns should be greatly reduced or even eliminated.

Both camps would find some grounds for agreement with each other. Weiler and Becker would surely agree that the potentially lengthy post-election process, where employers can delay a union victory by raising and litigation objections and challenges, should be shortened. And Bok and Getman et al. acknowledge that employer coercion can improperly interfere with the election process. But I think they also are both missing perhaps the most important issue in a representation campaign – namely, whether union representation is an economically rational choice for the employees making the selection. The Bok-Getman approach places little emphasis on this question, believing that employees will either base their decisions on irrational whims, hunches, or prejudices²⁵⁸ and/or are programmed well before a particular campaign to either accept or reject the union's offer.²⁵⁹ They thus discount the usefulness of the representation campaign in providing information to employees about the costs and benefits of unionization. Weiler and Becker, on the other hand, seem to believe that employees have all of the information they need once they have signed authorization cards. They discount the negative information about the union that employers may provide, and instead believe that employees have gotten all of the information they need to know before the campaign. However, they spend little time analyzing this process, and I suspect that they believe unionization would be in the interests of almost any employee out there.

As will be discussed further below, I agree that reforms should limit the delays caused by post-election challenges, and should try to curtail the effects of employee coercion. However, I also believe that the two approaches discussed above have overlooked the role of the campaign in providing critical information to employees about the costs and benefits of the unionization decision. Providing this information is the real purpose of the representation campaign and election, and the two prior reformist programs have paid little attention to this purpose. In the section that follows, I will discuss how Congress and the Securities and Exchange Commission have taken a very different approach to managing

²⁵⁸ Bok, *supra* note DB1, at 49-52.

²⁵⁹ GETMAN ET AL., *supra* note JG1, at 140.

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information in the context of the securities markets. In that context, regulation has been almost entirely focused on providing the right information to potential consumers. From that discussion, I then will endeavor to show why steps towards information disclosure in the market for labor representation have an even stronger normative basis.

PART III: THE CASE FOR REQUIRED DISCLOSURE IN THE UNION REPRESENTATION CAMPAIGN

A. *Information and Rational Contracting*

Rational decisions to exchange goods or services – in other words, trade – are the key mechanisms to improving our individual and societal welfare.²⁶⁰ Contracts are the legal mechanism for enforcing trades in our economic system. According to economic theory, contracts should be enforced because of their Pareto optimality: they increase the utility of all of the parties to the exchange.²⁶¹ Of course, there can be contractual winners and losers; many contracts are about hedging risk, and one party ends up bearing the risk. But when the contract is created, both parties agree to it (per economic doctrine) because they believe it increases their net present utility.

However, for contractual exchanges to be Pareto optimal, they must be made using the proper data, or “perfect information” in economic parlance.²⁶² If the data is faulty, the results will be faulty, no matter how

²⁶⁰ The stereotypical beginning to every microeconomics course is the discussion of utility involving two people each with a large supply of one good. One may have peanut butter, for example, and the other grape jam. The professor demonstrates how each party will be better off if they trade some of their good for some of the other party's good. For example, if Jack has ten jars of peanut butter and trades three of his jars for three jars of Jane's jam, both will be better off – their utility will increase.

²⁶¹ See Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 284 (1995) (“In the area of contract law, the efficiency argument concludes that courts should enforce all voluntary contracts that do not produce negative externalities, regardless of their distributive consequences. If a contract is voluntary, then it presumptively improves the well-being of both parties.”).

²⁶² See Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 881 (2003) (“Without accurate information about the quality and especially the price of any good, no person can minimize their opportunity costs, since they cannot compare the value of that product to their next best option. Thus, in a policymaking system of private

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logical the decisionmaker.²⁶³ To what extent do we simply trust parties to gather information for themselves? Given its importance to the bargaining context, information material to the transaction must at a minimum be protected from false or deceptive misinformation. In some cases, however, the parties – either individually or together – will be unable to generate the necessary levels of information.

The common law of contract has long struggled with how to manage information in the bargaining process. From the beginning courts have prohibited fraud – *i.e.*, misrepresentations about information material to the contract. However, the definition of “fraud” has long extended to omissions in disclosure as well as affirmative misrepresentations, as the famous case of *Laidlaw v. Organ*²⁶⁴ attests. Many scholars have attempted to provide a theoretical basis for determining when parties to a contract negotiation have a duty to disclose material information.²⁶⁵ Although one might say that, in the absence of a fiduciary relationship, there is no common law requirement to disclose, this is an overstatement.²⁶⁶ In fact, in a number of instances, courts have required parties to disclose information, or they will risk rescission or even liability for fraud.²⁶⁷

To a large extent, however, the common law of contractual disclosure has been superseded by a variety of statutory schemes that endeavor to regulate information in the context of particular markets. Consumer protection laws focus in part on providing information about critical

decisionmaking, where individuals act without accurate cost information, there is no policymaking at all, rather just the random and often tragic outcomes of market anarchy.”).

²⁶³ Or, as the saying goes, “garbage in, garbage out.” See Webopedia, garbage in, garbage out, *available at*:

http://www.webopedia.com/TERM/g/garbage_in_garbage_out.html.

²⁶⁴ 15 U.S. 178 (1817). At issue in *Laidlaw* was a contract for the sale of tobacco made at the close of the War of 1812. The buyer knew that the war had ended and, with that, the British blockade that had reduced the value of tobacco. The Supreme Court ruled that while there was no requirement for the buyer to disclose the information, he had a duty to disclose the information if asked directly about it by the seller. *Id.* at 194.

²⁶⁵ Kimberly D. Krawiec & Kathryn Zeiler, *Common Law Disclosure Duties and the Sin of Omission: Testing the Meta-theories* 91 VA. L. REV. 1795, 1796 (2005) (noting that “[d]ozens of law reviews” have dealt with this “hotly debated question[]”).

²⁶⁶ *Id.*

²⁶⁷ See RESTATEMENT OF CONTRACTS (SECOND) § 161 (listing four general exceptions).

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aspects of the product.²⁶⁸ The Food & Drug Administration requires extensive labeling on prepackaged food products in order to inform the public about ingredients, calories, and fat content.²⁶⁹ The Truth in Lending Act requires the disclosure of interest rates in understandable terms.²⁷⁰ The primary purpose of these statutes is to empower the consumer to make efficient decisions by having the proper information.²⁷¹

Perhaps the most comprehensive scheme of contractual regulation is the federal system of securities regulation. Even before the New Deal, state blue sky laws placed special restrictions on the sale of securities beyond the common law.²⁷² The Securities Act of 1933²⁷³ and the Securities Exchange Act of 1934²⁷⁴ then completely reshaped the playing field. They put into place a comprehensive federal system premised on antifraud protection and a process of mandatory disclosure. This scheme, while fleshed out through seventy years of amendment, regulation, and judicial opinion, retains relatively the same structure with which it began.

²⁶⁸ For example, the federal Moss-Magnuson Warranty Act requires disclosure about warranties on consumer products. See Joan Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties, and a Proposal for Reform*, 1985 ARIZ. ST. L. J. 589, 610 (“The basic goal of the Magnuson-Moss Warranty Act is to improve the warranty information available to consumers by providing for full disclosure of all written warranty terms in a clear and concise manner.”).

²⁶⁹ See 21 U.S.C. §§ 371(a), 393(b)(2)(A) (2000); 21 C.F.R. § 101.9 (2005); U.S. Food and Drug Administration, What FDA Regulates, at <http://www.fda.gov/comments/regs.html> (last visited Sept. 26, 2005). For discussion of a particular change in the regulations, see Food & Drug Admin., Food Labeling: *Trans Fatty Acids in Nutrition Labeling, Nutrient Content Claims, and Health Claims*, 68 Fed. Reg. 41434 (July 11, 2003).

²⁷⁰ Peterson, *supra* note CP1, at 880 (“The most important requirements of the Truth in Lending provisions centered around the disclosure of the cost of credit based on standard uniform requirements set out by the act and by the Federal Reserve Board.”). See also Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J.L. & PUB. POL’Y 199 (2005).

²⁷¹ See, e.g., Peterson, *supra* note CP1, at 883 (“Unlike interest rate caps and other control devices, disclosure regulation – at least in theory – increases the freedom of consumers through giving the opportunity to open one’s own eyes. With a uniform method of learning the costs and characteristics of credit contracts, debtors can determine which credit contracts are in their best interests.”).

²⁷² See Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 348 (1991).

²⁷³ 15 U.S.C. §§ 77a – 77aa (2000).

²⁷⁴ 15 U.S.C. §§ 78a – 78mm (2000).

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The disclosure requirements mandated by federal regulation are considerably broad. In the context of an initial offering, § 5 of the 1933 Act requires that issuers file a comprehensive registration statement with the Securities and Exchange Commission.²⁷⁵ Section 7 of the 1933 Act, along with Schedule A, sets forth the basics of the disclosure requirements and also empowers the Commission to establish further disclosure regulations.²⁷⁶ Schedule A sets forth thirty-to separate provisions of disclosure, including the issuer's articles of incorporation or other structural documents,²⁷⁷ the general character of the issuer's business,²⁷⁸ the amount of outstanding debt,²⁷⁹ remuneration paid to directors and officers,²⁸⁰ the security's price (or method of calculating the price),²⁸¹ items relating to possible conflicts of interest,²⁸² a detailed balance sheet,²⁸³ and a profit and loss statement.²⁸⁴ The Commission has further refined these requirements through a series of forms and further regulations. The Commission's forms break down what information must merely be disclosed to the Commission and what information must also be provided in the prospectus, a document provided to potential purchasers.²⁸⁵ However, these forms generally refer to Regulation S-K to define what exactly must be provided. Regulation S-K is significantly more detailed than Schedule A, detailing precisely what types of quantitative and qualitative information must be disclosed.²⁸⁶ For example, Regulation S-K has extremely detailed requirements on the disclosure of financial information,²⁸⁷ including a special provision on

²⁷⁵ 15 U.S.C. § 77e (2000).

²⁷⁶ 15 U.S.C. §§ 77g, 77aa (2000).

²⁷⁷ 15 U.S.C. § 77aa(31) (2000).

²⁷⁸ *Id.* § 77aa(8).

²⁷⁹ *Id.* § 77aa(12).

²⁸⁰ *Id.* § 77aa(14).

²⁸¹ *Id.* § 77aa(16).

²⁸² *See id.* §§ 77aa(17) (commissions paid to underwriters); 77aa(20) (amounts paid to promoters); 77aa(22) (recent issuer purchases of property held by directors or substantial stockholders).

²⁸³ *Id.* § 77aa(25).

²⁸⁴ *Id.* § 77aa(26).

²⁸⁵ *See, e.g.*, Form S-1, 2 Fed. Sec. L. Rep. (CCH) P7121, at 6237 (Oct. 22, 2001).

²⁸⁶ Regulation S-K, 17 C.F.R. §§ 229.10-229.702 (2005).

²⁸⁷ *See id.* §§ 229.301-229.304.

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management's discussion and analysis of the firm's financial condition and results of its operations.²⁸⁸

In the context of a securities offering, federal law integrates the required disclosure within an overall process of restrictions on information dissemination. Section 5(c) of the 1933 Act prohibits all offers to sell the securities prior to the filing of the registration statement.²⁸⁹ However, the Commission has given an extremely broad definition to the term "offer," holding that any communication reasonably calculated to generate a buying interest is an offer.²⁹⁰ After the registration materials have been filed, the issue enters the "waiting period" until the Commission has made the registration statement effective. Offers to sell made during the waiting period must generally also provide all of the information required in the prospectus.²⁹¹ Since some of this information may not be available until the offering price has been set, it may be impossible to furnish the required prospectus during the waiting period.²⁹² The Commission thus has made a limited exception to this Catch-22 by allowing "tombstone ads,"²⁹³ and preliminary "red herring" prospectuses.²⁹⁴ Once the waiting period has ended, all written offers for sale must be accompanied by a complete prospectus.²⁹⁵

Although quite complicated, the registration process is designed to accomplish three primary purposes: (1) make material information about the issuer public, (2) require the issuer to deliver some of that information to potential investors (through the prospectus), and (3) restrict the issuer's opportunities to promote its securities outside of these channels. It does not seem a stretch to say that the 1933 Act, and by extension the Commission, are endeavoring to create "laboratory conditions" for the

²⁸⁸ See *id.* § 229.303.

²⁸⁹ 15 U.S.C. § 77e(c) (2000).

²⁹⁰ Carl M. Loeb, Rhoades & Co., 38 S.E.C. 843 (1959). See also JAMES D. COX & THOMAS L. HAZEN, CORPORATIONS 723 (2d ed. 2003). There are some exceptions to this prohibition. See SEC Rules 137-139, 17 C.F.R. §§ 230.137-139 (2005).

²⁹¹ See 15 U.S.C. § 77b(a)(10) (2000) (defining any written as a prospectus); *id.* § 77e(b)(1) (requiring all prospectuses to contain certain information once the registration statement has been filed).

²⁹² COX & HAZEN, *supra* note CH1, at 724.

²⁹³ See 15 U.S.C. § 77b(a)(10) (2000); 17 C.F.R. § 230.134 (2005).

²⁹⁴ 17 C.F.R. § 230.430 (2005).

²⁹⁵ See 15 U.S.C. § 77e(b) (2000).

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sales of securities. They are trying to get material information to the consumer, and at the same time they are limiting opportunities for purchase without such information.

In contrast to the 1933 Act's focus on a security's initial sale, the Securities Exchange Act of 1934 regulates the sales of securities after they have been issued and are traded on the open market. The 1934 Act establishes a registration and supervision system for national securities exchanges²⁹⁶ and requires continuing disclosure for companies whose securities trade on those markets.²⁹⁷ The mandatory disclosure comes in the form of periodic reports: Form 10-K, an annual report; Form 10-Q, a quarterly report, and Form 8-K, an interim report required in limited circumstances.²⁹⁸ The 1934 Act also regulates brokers, members, and dealers of the exchanges,²⁹⁹ and imposes certain requirements with respect to proxy solicitations and tender offers.³⁰⁰ The SEC also enacted Rule 10b-5, its comprehensive antifraud provision, under § 10 of the 1934 Act.

A survey of every context in which contractual disclosure is required is beyond the scope of this article.³⁰¹ What follows instead is an argument for mandatory disclosure in the union representation context. More specifics about the content and extent of this disclosure will be discussed in Part VII. In this Part, I will discuss more generally the information failures in the market for union representation that would

²⁹⁶ 15 U.S.C. § 78f (2000).

²⁹⁷ 15 U.S.C. § 78m (2000).

²⁹⁸ Jeanne L. Schroeder, *Envy and Outsider Trading: The Case of Martha Stewart*, 26 CARDOZO L. REV. 2023, 2048 (2005).

²⁹⁹ 15 U.S.C. §§ 78k, 78o(c) (2000).

³⁰⁰ 15 U.S.C. §§ 78m, 78n (2000).

³⁰¹ Because of its relation to the employment contract, a brief discussion of the ERISA system of disclosure may be instructive. ERISA has a very specific statutory framework for disclosure. *See* 29 U.S.C §§ 1021-1031. Employers with covered plans must file information with the Department of Labor, the PBGC, the IRS, and plan participants. An example of one such disclosure requirement is the Summary Plan Description, which must be furnished to plan participants and "shall be written in a manner calculated to be understood by the average plan participant." 29 U.S.C. § 1022(a). The type of information required in the Description includes the name and type of administration of the plan, the name and addresses of administrators and trustees, and the procedures to be followed in seeking benefits under the plan. *See* 29 U.S.C. § 1022(b). In addition, ERISA requires annual reports, *id.* § 1023, plan descriptions, and notice of modification to the plans. *Id.* § 1021. These reports are generally made public. *Id.* § 1026.

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require mandated disclosure. In so doing, I will rely heavily on discussions about required disclosure in the securities markets, based on the comprehensiveness of that scheme and the deep theoretical literature surrounding it.

B. Arguments for Required Disclosure in the Union Representation Campaign

1. Union representation and the problem of information asymmetry.

As noted above, the basic common law contractual paradigm assumes that parties to a contract will obtain their own information. Although the common law prohibits fraud and requires truthful disclosure in response to questioning, there is no general duty to disclose information. The set of cases that usually come to mind are those involving some hidden cost or benefit that has been discovered, at some cost, by one of the parties. Requiring disclosure of this information will dampen the incentive to find this information in the first place, and thus society will have less information and will be worse off.³⁰²

Moreover, in most cases the market will provide incentives for participants to disclose information voluntarily. Consumers will not buy a product unless they know something about it. If a seller fails to disclose sufficient information, consumers will demand the information; those sellers that provide it will sell more products. We need information to get us interested in contracting in the first place. Of course, advertising is to some extent hype and persuasion, but it is also information. Sellers have an incentive to provide enough information so that buyers can identify their product and judge for themselves whether they want the product and at what cost.

Of course, it may be possible for a market to fail to provide such information on its own. For reasons discussed further below, the market participants have incentives to reveal insufficient information about the product, thus leading eventually to a failure of the market. One of the most famous examples of such a situation is the market for used cars as modeled by George Akerlof in *The Market for "Lemons"*.³⁰³ As described by Akerlof, the sellers of used cars have much more information about the true quality of the car than do buyers. Moreover, it

³⁰² RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 111 (6th ed. 2003).

³⁰³ George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

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is difficult to correct this information asymmetry, given the inability of most buyers to determine quality or to trust a seller's purported information disclosure. Under Akerlof's model, buyers will be forced to assume that a used car is a "lemon" and thus will only offer to pay the value of a lemon, regardless of the car's actual quality. Those with quality used cars will thus elect to keep their cars rather than sell them at a drastically reduced value, leaving only those with actual lemons in the market. Akerlof thus predicts that a downward spiral may result, in which "it is quite possible to have the bad driving out the not-so-bad driving out the medium driving out the no-so-good driving out the good in such a sequence of events that no market exists at all."³⁰⁴

The "market for lemons" problem is not confined to used cars. As Bernard Black has pointed out, securities markets are a "vivid example" of Akerlof's market for lemons; "[i]ndeed, they are a far more vivid example than [the] original example of used cars."³⁰⁵ Black explains:

Used car buyers can observe the car, take a test drive, have a mechanic inspect the car, and ask others about their experiences with the same car model or manufacturer. By comparison, a company's shares, when the company first goes public, are like an unobservable car, produced by an unknown manufacturer, on which investors can obtain only dry, written information that they can't directly verify.³⁰⁶

If investors cannot verify the information they receive about a security, the market is ripe for exploitation. Knowing this, investors will treat every security as if they cannot trust the underlying facts about it. This underpricing will drive the higher quality issuers out of the market, leading to Akerlof's downward spiral which completely destroys the market.

Why is information so crucial to the securities markets? A security, particularly corporate shares, represents a property right in something that exists only as a fictional person, created through documents filed in a particular state. Shareholders generally do not run the business; they

³⁰⁴ *Id.* at 490.

³⁰⁵ Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781, 786 (2001).

³⁰⁶ *Id.*

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contribute capital so that others may run a profitable business and pay the shareholders the residual. A shareholder trusts the people who run the corporation – officers and directors – to act as their representatives in running the corporation so as to maximize shareholder value.³⁰⁷

Although shareholders elect the board of directors, who in turn appoint the officers who run the corporation, this power is very difficult to exercise in a large corporation. Thus, shareholders must be able to trust directors and officers to use their money appropriately. There is a very real “agency costs” concern that lies at the heart of much corporate law today.³⁰⁸

Are unions subject to the “market for lemons” problem? Upon examination, they are subject to agency cost concerns similar to those of corporate shareholders. Union members trust that their union dues will be used by union officials to get them the best terms and conditions of employment possible. And similar to shareholders, union members have the right to elect these officials, although that power is similarly attenuated, especially at the national level.³⁰⁹

Union representation services also have the more general information asymmetries that contribute to a “market for lemons.” Unions provide services that are not transparent; they are not easy to judge before purchase.³¹⁰ The union promises to improve the employees’ terms and conditions of employment. How much better will the terms and conditions be? Will the negotiations proceed easily, or must a painful strike be endured? How effective will the union be in representing employees in grievance arbitrations? Are union officials paid the appropriate amount, or are they overpaid? Would they properly manage my retirement? It is very difficult to know ahead of time what the union

³⁰⁷ Directors are not strictly agents of the corporation; they are in fact more akin to elected representatives. *See, e.g.,* Automatic Self-Cleansing Filter Syndicate Co., Ltd. v. Cunningham, 2 Ch. 34 (Eng. C.A. 1906) (establishing the right of directors to act contrary to the wishes of a majority of shareholders as expressed through a resolution); *Continental Securities Co. v. Belmont*, 206 N.Y. 7, 16 (1912) (“[T]he directors are not ordinary agents . . . [T]hey are trustees with the power of controlling the property . . . without hindrance.”).

³⁰⁸ Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

³⁰⁹ Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. ILL. L. REV. 367, 367-68.

³¹⁰ *Id.* at 379-80.

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dues will buy.³¹¹ In addition, union services cannot be trial-tested before purchasing them. It takes a very costly and time consuming process and agreement by a majority of employees to purchase union representation services. And as will be discussed below,³¹² once those services have been purchased, it is very difficult to get out of them.

The Getman, Goldberg, and Herman study indicated that many workers made their union election decisions based on previous experiences with union membership.³¹³ But as the number of unionized private employees continues to decline, fewer workers have such experiences to draw on. In voting for union representation, employees must make a leap of faith: that the money they pay to the union will be used to better their terms and conditions of employment, rather than leaving them the same or even making them worse. Like the decision to buy a stock, the purchaser needs lots of information about the organization in order to determine whether the benefits of such a decision outweigh the costs.

But even if employees cannot easily get the necessary information by looking at the product or from past experience, won't union and employers provide the necessary information themselves? As discussed next, there are reasons to believe that the information will not be properly conveyed.

2. The current market for union representation is poorly constructed to deliver information to potential customers.

The market for union representation services is constructed as an election. Employees obtain representation services by voting for such services through a secret ballot election conducted by the Board. As noted earlier,³¹⁴ the pre-election process is often analogized to a political campaign in which the union and the employer are running against each other. In a traditional political campaign, the parties to the election are

³¹¹ The problem applies even after employees have joined the union. *See id.* at 379-80 ("Union members have even greater difficulty monitoring and evaluating their leaders. Was the last wage increase a good one? Did the leaders work hard at the bargaining table, or did they shirk? Could tougher negotiations have produced more? Are the union leaders becoming too cozy -- or too confrontational -- with management? Is the low return from the pension fund due to improper investments or bad market conditions? Are leaders earning their salaries? In short, could leaders be doing better?").

³¹² *See infra* Part III.B.4.

³¹³ GETMAN ET AL., *supra* note JG1, at XXX.

³¹⁴ *See supra* Part II.B.

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expected to generate all the necessary information for voters to make their decision. Each candidate has an incentive to point out his or her positive features, as well as his or her opponent's negative features. Given these incentives, the voters can expect to get all positive and negative information about the candidates from the candidates' pre-election campaigns.³¹⁵

In a union representation campaign, the union is seeking, through an election, to represent a group of the employer's workers. The union thus has incentives to present itself in a positive light. Like any seller of services, the union is trying to persuade its potential customers that they should purchase its services.³¹⁶ Union representatives may use a variety of sales techniques that have been passed down through the centuries. But their incentives are to get employees to sign up with the union.

In so doing, a union also has incentives to portray the employer in a negative light. After all, the union's services are simply group representation of employees in their negotiations with employers over the employment contract. The union must therefore convince employees that the employer is not giving them the best terms and conditions that it could. If a union cannot improve the employees' lot, there is no need for its services. So the union must convince employees that the union could negotiate on the employees' behalf to get a better deal. In making this case, the union may bring out information about the employer that may seem negative to employees. For example, the union may argue that the employer's profit margins are extremely high. The union may argue that the employer is paying employees much less than other companies in the

³¹⁵ Thus, much of the debate surrounding campaign reform has been whether parties have sufficient funds to get their message out. Those in favor of campaign finance reforms generally believe that a combination of federal campaign funding and limitations on private donations are necessary to enable a level informational playing field. See, e.g., Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1047 (2005) ("[E]lectoral corruption in a campaign occurs insofar as private power employs influences that are less relevant to the choice between candidates and drives out influences that are more relevant."). However, critics believe that limitations of private campaign spending restrict free speech and curtail the flow of information. See, e.g., Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1061 (1998) (arguing that any limitations on spending reduce communications).

³¹⁶ See Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501, 515 (discussing the market for union representation services).

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field pay their workers. The crux of the case is that the employer is holding back, and the employees need the union to maximize their contractual benefits.

As Craig Becker has pointed out, the employer is in some respects a third party to this transaction.³¹⁷ Whether I hire Jim to represent me in my negotiations with Earl is really no business of Earl's. But of course the employer often will have a strong interest in seeing the union's election petition defeated. Union representation may very well mean higher wages and better benefits for employees. It means extensive bargaining sessions with the union over the contract.³¹⁸ If the parties agree to a contract, the employer must inform the union of any future changes in working conditions and then bargain over those as well.³¹⁹ If the parties do not agree to a contract, the employer may face a strike or unfair labor practice charges for failure to bargain in good faith. For an employer looking to preserve the contractual status quo as well as its ability to act independently with regard to employees, such an employer has a very strong interest in seeing the union defeated.

In such cases the employer will have incentives to disseminate negative information about the union. Of course, what is negative to the employer – i.e., the potential for higher wages – is not a negative for the employees. So the employer will also have the incentive to find out and disseminate information about the union that is negative from an employee's perspective. For example, information about the union's past ineffectiveness, its wastefulness of union funds, and its inability to live up to its campaign promises are all useful to the anti-union employer in dissuading employees from voting for the union. The employer will also have incentives to paint itself in a positive light. The employer will want to show that it is giving its employees the best deal it can, and that the union will not be able to get any further concessions from the employer.

However, the previous discussion assumes an employer that does not want union representation. Although all employers have some incentives to avoid unionization, due to the added time and expense imposed by bargaining, employers who have the most incentive to defeat the union are those who have the most to lose from unionization. And by

³¹⁷ See Becker, *supra* note CB1, at 498-500.

³¹⁸ 29 U.S.C. § 158(a)(5) (2000).

³¹⁹ See 29 U.S.C. § 158(d) (2000) (requiring employer to inform collective bargaining representative of changes to terms and conditions of employment).

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extension, those employers will therefore put on the fiercest campaign. However, the employees of such employers arguably have the least need to get negative information about the union, since the union would be likely to help them.³²⁰

The converse is also true. In those situations where the union is least likely to help employees – namely, where the union will not be all that effective in improving terms and conditions – the employer has the least incentive to wage a vigorous campaign. These incentives are most skewed when the union has favorable relations with the employer. Obviously, an employer will not disseminate negative information about an employer-dominated union. But such unions are illegal under the NLRA, and the Board would have the power to disempower such a union were employees to complain.³²¹ However, other unions exist which are known to be more friendly to employers, and more apt to agree to favorable contracts, but their activities may not cross the line into illegal collusion. The existence of so-called “sweetheart” unions is an understudied but undeniable part of the union landscape.³²² Employers have no incentives to campaign against such unions. In fact, an employer has strong incentives to court such unions, especially if there is a possibility of a good-faith union drive down the road. As will be discussed below, with a sweetheart union an employer could lock its employees into a collective bargaining agreement for three years. Thus, incentives for the employer to provide negative information about the union will be the lowest when structurally the need for such information will be the highest.

Of course, if more than one union is seeking to represent a group of employees, the unions will provide negative information about each other. But such elections are comparatively rare. In 2004, the NLRB handled 2,565 elections involving only one union, and 154 elections

³²⁰ In saying this I recognize that there still is a need for negative information about the union, even if the employer has a lot to lose from unionization. The union could still be corrupt or ineffective. My point is that, holding union effectiveness constant, employers have an increasing incentive to defeat the union as employee benefits from unionization (due to employer concessions) increase.

³²¹ 29 U.S.C. § 8(a)(2) (2000).

³²² Brian Petruska, *Choosing Competition: A Proposal to Modify Article XX of the AFL-CIO Constitution*, 21 HOFSTRA LAB. & EMPL. L.J. 1 (2003).

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involving more than one union.³²³ Much of this is a result of AFL-CIO guidelines restricting member unions from competing against each other. Under Article XX of the AFL-CIO Constitution, member unions are not permitted to organize or attempt to represent employees that are already represented by another AFL-CIO union.³²⁴ In addition, member unions cannot disseminate information as part of an organization campaign that may “adversely affect” the reputation of another member union.³²⁵ These restrictions provide AFL-CIO monopolies over certain groups of employees. In so doing, they also restrict the information available to employees about the union.

Markets depend in large part on competition within the market to provide the necessary information about the quality of goods and services. Advertising is often centered around a comparison between one product and another, attempting to show why the advertised product is superior. In addition, sellers have incentives to provide information based on market pressure from other competitors. If other firms are revealing information about their product that consumers find useful, even if that information is mixed, an individual firm will be punished by consumers if it does not provide comparable information. If there is only one firm in the market, however, that firm will have much greater leverage in setting consumer expectations about the level of information disclosure.

Thus, the union representation election often provides improper incentives for the provision of material information to employees. The union has incentive to provide positive information about itself and negative information about the employer. The Board’s campaign model thus depends on the employer to provide positive information about itself and negative information about the union. However, the employer’s incentives will be weakest in those situations where employees most need to receive negative information about the union – namely, when the union is looking for a sweetheart deal. Given these incentives, employees may

³²³ National Labor Relations Board, Sixty-Ninth Annual Report 16 (2005), *available at*: http://www.nlr.gov/nlr/shared_files/brochures/Annual%20Reports/2004%20WholeAnnualReduced.pdf.

³²⁴ AFL-CIO Const. art. XX, § 2, *available at*: <http://www.afl-cio.org/aboutus/thisistheaficio/constitution/art20.cfm>.

³²⁵ *Id.* § 5.

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not get information about a less-than-zealous union until it is too late – namely, until after they have been locked into a three-year contract.³²⁶

3. The market for union representation does not have a vigorous role for reputational intermediaries.

One argument against mandatory disclosure in the context of the securities markets is cited to the protection provided to the market by “reputational intermediaries.”³²⁷ Although mandatory disclosure critics recognize that firms may have inadequate incentives to disclose information, they argue that the demand for information will create a market for that information.³²⁸ If sellers need to provide information in order to sell their product, they will provide the information; the market, through interactions between sellers and buyers, is best equipped to determine what information is necessary to disclose.³²⁹ While acknowledging that information about securities may be more difficult to verify, critics of mandatory disclosure argue that securities are not unique in this regard. According to one set of commentators, the “lemons” argument proves too much, as it is also hard to verify claims about the efficacy of toothpaste or the pricing of funeral services.³³⁰ So without mandatory disclosure, the securities markets would not dry up; instead,

³²⁶ The “contract bar” rule prevents employees from decertifying a union for most of the length of the collective-bargaining agreement. The maximum length of this bar is three years. Decertification procedures are discussed more fully *infra* at Part III.B.4.

³²⁷ Black, *supra* note BB1, at 787.

³²⁸ See, e.g., HENRY MANNE, *INSIDER TRADING AND THE STOCK MARKET* (1966); George J. Benton, *The Effectiveness and Effects of the SEC’s Accounting Disclosure Requirements*, in *ECONOMIC POLICY AND THE REGULATION OF CORPORATE SECURITIES* 23, 24 (Henry G. Manne, ed. 1969); George Stigler, *Public Regulation of the Securities Markets*, 37 J. BUS. 117 (1964).

³²⁹ See, e.g., HOMER KRIPKE, *THE SEC AND CORPORATE DISCLOSURE: REGULATION IN SEARCH OF A PURPOSE* 119 (1979) (“A disclosure will be supplied voluntarily by issuers interested in the capital markets when there is consensus among suppliers of capital or other transactors in the capital market that this information is necessary to them for lending and investment decisions. Issuers will supply it because the alternative is to forego access to the capital markets.”).

³³⁰ Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 681, 714 (1984).

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issuers would use the same tools as other sellers to market their wares to investors.³³¹

How would this happen? Issuers would voluntarily disclose all of the information that investors would need in order to buy the stock at a proper price. If a company refused to disclose, investors would be justifiably wary, and the prices for their securities would drop precipitously.³³² However, Akerlof's "market for lemons" thesis assumes that the information about the product is hard to verify. If there is no system in place for mandatory disclosure and governmental penalties for failing to do so, then investors may be concerned about the quality of the information they receive. And Akerlof's downward spiral could kick in. Rather than relying on the threat of government enforcement to assure the quality of information disclosed, issuers would have to find a private way to assure investors of information quality.³³³ This is where reputational intermediaries come in. These market players would sell their reputations as honest, impartial, and savvy investigators to investors as a means of checking against issuer fraud. Even with our system of mandatory disclosure, our securities market still places vital tasks in the hands of reputational intermediaries. Accounting firms provide independent audits of the firm's financial health. Investment banks provide further verification by acting as underwriters and thus vouching for the security. Attorneys comb through the issuer's disclosures to make sure they comply with the relevant law. And research analysts pore over the disclosures and then report their impressions to clients, financial media outlets, and eventually the investing public.

There is no denying the importance of reputational intermediaries, or "gatekeepers,"³³⁴ to the proper functioning of the securities markets. The failures of the 2001-2002 corporate scandals were often put at the feet of

³³¹ See Nicholas L. Georgakopoulos, *Why Should Disclosure Rules Subsidize Informed Traders?*, 16 INT'L REV. L. & ECON. 417, 418-19 (1996) (using the Coase theorem to argue that investors will bargain for the appropriate level of fraud-prevention measures).

³³² See *id.* at 683 ("If the firm simply asked for money without disclosing the project and managers involved, . . . it would get nothing.").

³³³ See *id.* at 675 (discussing the use of "outsiders" to verify company financial information).

³³⁴ See John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid"*, 57 BUS. LAW. 1403, (2002) (defining gatekeeper in the securities regulation context as "reputational intermediaries who provide verification and certification services to investors").

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reputational intermediaries,³³⁵ and the Sarbanes-Oxley Act of 2002 endeavors to shore up the ability of accountants and lawyers to serve as informational gatekeepers.³³⁶ However, much of the current “reputational intermediaries” system depends on the law to require or reinforce the provision of those services. For example, the Sarbanes-Oxley Act imposed rigorous independence requirements on accountants and created a new independent oversight board to maintain accounting standards.³³⁷ The market did not require these of accountants prior to Sarbanes-Oxley, and yet they are perhaps the least controversial aspects of the new law.³³⁸ Attorneys generally act as intermediaries with respect to legal mandates, including disclosure requirements. In the absence of those mandates, attorneys would only be responsible for insuring compliance with private contracts. The stock exchanges are given special privileges and responsibilities by the SEC as self-regulating organizations.³³⁹ In his blueprint for a strong securities market, Black notes that such a market needs not only reputational intermediaries but also laws regulating these intermediaries. For example, one of Black’s eighteen requirements³⁴⁰ for controlling informational asymmetry is “[a] sophisticated accounting profession, with the skill and experience to catch at least some instances of false or misleading disclosure.”³⁴¹ However, Black also requires “laws that impose on accountants enough risk of liability to investors . . . so that the accountants will resist their clients’ pressure for laxer audits or more favorable disclosure.”³⁴²

³³⁵ See, e.g., FRANK PARTNOY, *INFECTIOUS GREED: HOW DECEIT AND RISK CORRUPTED THE FINANCIAL MARKETS* (2003); Coffee, *supra* note JCC1.

³³⁶ Lawrence E. Mitchell, *The Sarbanes-Oxley Act and the Reinvention of Corporate Governance?*, 48 VILL. L. REV. 1189, 1189 (2003) (noting that Sarbanes-Oxley “brings into the realm of internal governance the gatekeepers that once stood outside the box, including auditors, analysts and lawyers”).

³³⁷ See 15 U.S.C. §§ 78j-1(g) (Supp.) (creating new independence requirements); *id.* §§ 7911-7919 (establishing Public Company Accounting Oversight Board (PCAOB)).

³³⁸ But cf. Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1533-37 (2005) (discussing the mixed quality of empirical evidence about the efficacy of auditor independence).

³³⁹ 15 U.S.C. § 78(f) (2000) (providing for the registration of “national security exchanges”).

³⁴⁰ See Black, *supra* note BB1, at 790-99.

³⁴¹ *Id.* at 793.

³⁴² *Id.* at 794. Such laws are necessary because reputation is not always enough. Certainly, over time investors will learn that a particular accounting firm is too

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Union financial disclosure is governed by the Labor-Management Reporting and Disclosure Act, also known as the Landrum-Griffin Act.³⁴³ The Department of Labor implements the LMRDA's requirements through regulations;³⁴⁴ these regulations were recently modified to require a greater amount of disclosure.³⁴⁵ However, the new regulations have been criticized for not requiring unions to employ independent or outside auditors.³⁴⁶ By allowing unions to rely on their own employees to report sensitive financial data, the LMRDA's regulations do not require the additional set of independent eyes to verify the veracity of that data. Although some large unions do use outside auditors in managing their finances, outside auditors are a general regulatory requirement for publicly-traded companies.³⁴⁷

Of course, LMRDA disclosure is designed for those who have already joined the union. An employer may use the union's disclosures for its own campaign purposes, often using the photocopy of the Department of Labor's form to prove its veracity.³⁴⁸ But there is no requirement that employees receive what the union discloses to the LMRDA during the course of a union representation campaign. They may not even know of

superficial in its audits, or that a stock exchange fails to require the proper documentation for acceptance. But just as there can be a "lemons" market for securities, there can be a "lemons" market for those who vouch for securities. Investors cannot know precisely how well their reputational intermediaries are doing their jobs. However, slightly more forgiving accountants will be desirable to issuers, who will be looking for reputational intermediaries to put them in the best light. Thus, market forces will drive accountants to be less strict, leading to less confidence from investors in their results. As Black notes: "The result is ironic: The principal role of reputational intermediaries is to vouch for disclosure quality and thereby reduce information asymmetry in securities markets. But information asymmetry in the market for reputational intermediaries limits their ability to play this role." *Id.* at 788.

³⁴³ 29 U.S.C. §§ 401-531 (2000).

³⁴⁴ See 29 C.F.R. §§ 403.1-403.11, 408.1-408.13 (2006).

³⁴⁵ See Labor Organization Annual Financial Reports, 68 Fed. Reg. 58,374 (Oct. 9, 2003) (codified at 29 C.F.R. §§ 403.1-403.11, 408.1-408.13 (2006)).

³⁴⁶ See *Recent Regulation: Department of Labor Increases Union Financial Reporting Requirements*, 117 HARV. L. REV. 1734, 1734 (2004) [hereinafter *Recent Regulation*].

³⁴⁷ *Id.* at 1739.

³⁴⁸ See LOUIS JACKSON & ROBERT LEWIS, WINNING NLRB ELECTIONS: MANAGERS'S STRATEGY AND PREVENTIVE PROGRAMS 18-19 (1972) (discussing how employers can use LMRDA disclosure in their campaign); ROGER S. KAPLAN & PHILIP B. ROSEN, RESPONDING TO UNION ORGANIZING CAMPAIGNS § 6.06 (2002) (same).

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its existence. The NLRB is an independent agency, as distinct from the Department of Labor, which is an executive branch agency.³⁴⁹

Employees in the midst of a representation campaign may not know that there is information available that might be useful to their representation decision until after they are already in the organization.³⁵⁰

In addition, there is not the vibrant financial and consumer media that exists for other products and services. According to Black, another critical institution for a vibrant securities market is “[a]n active financial press and securities analysis profession that can uncover and publicize misleading disclosure and criticize company insiders and (when appropriate) investment bankers, accountants, and lawyers.”³⁵¹ As Black noted:

Reputation markets require a mechanism for distributing information about the performance of companies, insiders, and reputational intermediaries. Disclosure rules help, as do reputational intermediaries' incentives to advertise their successes. But intermediaries won't publicize their own failures, and investors will discount competitors' complaints because they come from a biased source. An active financial press is an important source of reporting of disclosure failures.³⁵²

The press does cover union failures and scandals, and such information is obviously relevant to the union representation decision. However, there is not the same level of coverage or sophistication that is applied to information about the securities markets. Nor is there the same sort of attention that is given to consumer products through such organizations as

³⁴⁹ For a discussion of the difference between independent agencies and executive branch agencies, see Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431, 445-51 (1996).

³⁵⁰ In fact, the information is accessible on the Department of Labor's website. See Department of Labor, LMRDA Reporting and Public Disclosure, *available at*: <http://www.dol.gov/esa/regs/compliance/olms/rrlo/lmrda.htm>.

³⁵¹ See Black, *supra* note BB1, at 798.

³⁵² *Id.*

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Consumer Reports.³⁵³ There is no “Consumer Reports for Unions.” For a variety of reasons, it seems unlikely that reputational intermediaries such as “union analysts” will emerge any time soon. As AFL-CIO unions do not compete against one another, employees looking for AFL-CIO representation only have one choice. Unlike securities, union representation is not sold on a fungible national market. Thus, there is not the money to be made on selling information about unions on a national scale. Additionally, potential union members would not be in a position to pay significant sums for the kind of serious analysis that stock investors enjoy. And if they were, they still might not choose to do so given the free-rider problems inherent in obtaining the information. The information would benefit all potential employees at the firm. In fact, the purchaser would have an incentive to share it, as the purchaser still needs a majority of employees to agree with her if she wishes to prevail on the representation question. But while the benefits will accrue to all, it may not be possible to get all to agree to share in the costs. Given the free-rider concerns, information that would be efficient for all to obtain might not be efficient for only one to obtain.

In sum, the role of reputational intermediaries in supplying information to other markets is not replicated in the union representation market. Their absence is yet another reason for concern about the information employees receive.

4. The market for union representation does not have an easy exit once consumers have made their purchase.

A corporate shareholder traditionally has two options if unsatisfied with the direction of the company. The shareholder can either vote for new directors or sell the shares to someone else. The alienability of shares is a critical part of bundle of shareholder rights.³⁵⁴ Unlike partnerships, corporations allow investors to sell their interests in the firm without the need for unanimous approval or dissolution.³⁵⁵ And publicly-

³⁵³ A search of the Consumer Reports website revealed no information about unions. See Consumer Reports Search Results for “Unions,” available at: <http://www.consumerreports.org/cro/search.htm?query=unions>.

³⁵⁴ See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439-40 (2001) (noting that transferable shares are one of the five “core functional features” of the corporate form).

³⁵⁵ Compare Uniform Partnership Act § 29 (dissolution provision) with 8 Del. C. § .

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traded companies are treated quite differently than closely held corporations because of the ease of exit. The ability to get out of the investment gives shareholders an escape hatch in case they become dissatisfied down the road.

In the market for union representation, the consequences of buying into the union are quite different. The most obvious difference is that the purchase of a stock gives the buyer something to resell, while a purchaser of services generally can only stop buying the services. In that sense, exit may be easier for the purchaser of services, because there is no need to find someone else to buy it from you. However, service contracts can have lengthy time periods, in which exit prior to the specified close can be quite expensive.

When a majority of employees vote in favor of a particular union during a representation election, they are choosing that union to represent them in collective bargaining. Once selected, the union serves as that representative indefinitely. In order to stop buying the union's services, employees must vote in a decertification election.³⁵⁶ As in the representation election, a decertification election will only be conducted if the petitioner can show that at least thirty percent of the employees in the bargaining unit are in favor of such an election.³⁵⁷ The NLRB then conducts a secret ballot election and decertifies the union if supported by a majority of the votes.

The decertification process is not easy; it takes time to collect signatures for the petition, hold the actual election, and then resolve any disputes over pre-election conduct. However, the statute also provides that no election can be held within a year after an election has been held.³⁵⁸ In the representation context, the Board has extended this ban until a year after it has actually certified the union as bargaining representative.³⁵⁹ The Board will consider any decertification petition filed within a year of certification to be untimely.³⁶⁰ Thus, the contract

³⁵⁶ 29 U.S.C. § 159(c)(1)(A)(ii) (2000).

³⁵⁷ NLRB Rules and Regs. § 102.61.

³⁵⁸ 29 U.S.C. § 159(c)(3) (2000).

³⁵⁹ *Brooks v. NLRB*, 348 U.S. 96 (1954).

³⁶⁰ *See Chelsea Indus.*, 331 NLRB 1648 (2000).

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for union services has at a *de jure* one-year minimum term from the start.³⁶¹

If the union and the employer agree to a contract, the Board imposes an additional “contract bar” on potential decertification elections. Under the contract-bar doctrine, employees are prohibited from filing a decertification petition during the life of a negotiated collective bargaining agreement.³⁶² Thus, once the union and employer have agreed to terms, the employees must retain the union for the life of the contract. The contract bar lasts a maximum of three years, even if the agreement goes beyond that.³⁶³ However, the agreement need not be ratified by members in order to have preclusive effect, unless the agreement by its terms requires such approval.³⁶⁴

Of course, if the union and employer keep negotiating agreements, making sure to have a new contract before the other one expires, the employees would never have an opportunity to decertify the union. Thus, the Board has created a thirty-day window in which decertification petitions may be filed. The Board will consider a petition timely filed if it is filed no more than ninety days, but no less than sixty days, before the expiration of the agreement.³⁶⁵ The Board created the sixty-day cutoff in order to give the union a period of negotiation “free from the threat of overhanging rivalry and uncertainty.”³⁶⁶ Although there are some exceptions to the contract-bar doctrine, they generally involve an illegal clause in the contract³⁶⁷ or union incapacity through schism or defunctness.³⁶⁸

The one-year and contract-bar rules are most dangerous when there is collusion between the employer and the union. Under such circumstances the employer and the union can agree to a contract and prevent the

³⁶¹ Since it will take some time between the filing of the petition and the decertification election, the bar is actually longer than a year. Employers are not allowed to withdraw recognition after a year based on a decertification petition presented to the employer before the year’s end. *Id.*

³⁶² See *Cind-R-Lite Co.*, 239 NLRB 1255 (1979).

³⁶³ *General Cable Corp.*, 139 NLRB 1123 (1962).

³⁶⁴ See *Stur-Dee Health Prods.*, 248 NLRB 1100 (1980); *Appalachian Shale Prod. Co.*, 121 NLRB 1160 (1958).

³⁶⁵ See *Leonard Wholesale Meats Co.*, 136 NLRB 1000 (1962).

³⁶⁶ *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1001 (1958) (quotations omitted).

³⁶⁷ See *Hardin & Higgins*, *supra* note HH1, at 527-29.

³⁶⁸ See *id.* at 535-38.

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employees from voting out the union for up to three years.³⁶⁹ However, even when a union is merely incompetent, employees may still be stuck with a poor bargaining representative for a lengthy period of time.

The Board does allow an alternative to decertification for removing a union from representation. An employer may refuse to bargain with a union if the union has in fact lost the support of a majority of the employees.³⁷⁰ This standard replaced the old rule which permitted employers to cease negotiating based on a “good faith reasonable doubt” that the union had continuing majority support.³⁷¹ Under the new standard, an employer may cease to negotiate with the union if it can prove that the union no longer enjoys majority support. In order to allow for employers to determine this in the face of questions about union support, the Board allows for the employer to petition for a decertification election based on “good faith reasonable uncertainty” about the continuing majority status.³⁷² However, an employer is allowed to poll its employees if it has good faith reasonable doubt about continuing majority status.³⁷³ Thus, doubt is enough to enable the employer to poll, and the poll may provide the employer with evidence that the union no longer enjoys majority support.³⁷⁴ In the alternative, uncertainty – as evidenced by employee dissatisfaction – will be sufficient to allow an employer to call an election as to the union’s continued support.³⁷⁵

There are substantial policy reasons for making it difficult for employees to decertify a union. However, such difficulties also impose a cost. Because of the difficulties of exit, there is a higher premium placed on employees’ ability to make the correct decision at the beginning.

5. The NLRB does not police misrepresentations in the union representation campaign.

³⁶⁹ See G. Robert Blakey & Ronald Goldstock, “*On the Waterfront*”: *RICO* and Labor Racketeering, 17 AM. CRIM. L. REV. 341, 344 (1980) (recognizing that the contract-bar rule allows the employer and union to benefit from a “sweetheart” contract).

³⁷⁰ Levitz Furniture of the Pacific, 333 NLRB 717, 717 (2001).

³⁷¹ See Allentown Mack Sales & Services v. NLRB, 522 U.S. 359 (1998).

³⁷² Levitz, 333 NLRB at 717, 723.

³⁷³ *Id.* at 723.

³⁷⁴ In an unfair labor practice hearing, the employer would bear the burden of proving actual loss of majority support. *Id.* at 725.

³⁷⁵ See *id.* at 728-29.

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As discussed previously,³⁷⁶ the Board has held that misrepresentations do not violate the Board's "laboratory conditions" as long as such misrepresentations are not akin to forgery.³⁷⁷ In summarizing the rationale for its policy, the Board stated:

In addition to finding [a more restrictive] rule to be unwieldy and counterproductive, we also consider it to have an unrealistic view of the ability of voters to assess misleading campaign propaganda. As is clear from an examination of our treatment of misrepresentations under the Wagner Act, the Board had long viewed employees as aware that parties to a campaign are seeking to achieve certain results and to promote their own goals. Employees, knowing these interests, could not help but greet the various claims made during a campaign with natural skepticism. The "protectionism" propounded by the [the earlier] rule is simply not warranted. On the contrary, as we found in *Shopping Kart*, "we believe that Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it."³⁷⁸

If, as Craig Becker has noted, the representation election is akin to a political campaign,³⁷⁹ a hands-off policy towards the hurly-burly world of campaigning might be an appropriate one.³⁸⁰ However, such a stance is anathema in the world of contracts, where fraud is universally prohibited. Common law fraud prohibits deception that leads to reliance, and in some circumstances even a failure to disclose can constitute deception. However, many contractual regulatory schemes have developed stricter prohibitions against misrepresentations. In the securities context, for example, federal securities law have several express and implied causes

³⁷⁶ See *supra* Part I.B.4.

³⁷⁷ *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 131-32 (1982).

³⁷⁸ *Id.* at 132 (quoting *Shopping Kart Food Market, Inc.*, 228 NLRB 1311, 1313 (1978)).

³⁷⁹ See Becker, *supra* note CB1.

³⁸⁰ See Evan Richman, Note, *Deception in Political Advertising: The Clash Between the First Amendment and Defamation Law*, 16 CARDOZO ARTS & ENT. L.J. 667, 670 (1998) (noting the lack of regulation for misrepresentations in the political arena).

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of actions against misrepresentations.³⁸¹ Perhaps the most important antifraud provision is Rule 10b-5, which prohibits misrepresentations or misleading omissions in the context of the purchase or sale of a security.³⁸² Rule 10b-5 offers substantially more protection against misrepresentations than traditional common law fraud.³⁸³ There has been little controversy about Rule 10b-5 basic mission: to eliminate misrepresentations and misleading omissions in the market for securities.³⁸⁴

Thus, unlike pretty much any other product market, there is no check against fraud in the market for union representation services, except in the very narrowest of circumstances. This failure to police against fraud is yet another reason for concern about the quality of information available to employees.

6. Market failures contribute to a lack of public confidence in the market for union representation.

The percentage of private employees represented by unions has steadily declined from the 1950s up until this year.³⁸⁵ These declines come in the face of polls showing overall public support for unions. For example, recent polls show that a majority of the public approve of labor

³⁸¹ In addition to Rule 10b-5, which prohibits misrepresentations or omissions in connection with the purchase or sale of a security, § 11(a) of the Securities Act, *see* 15 U.S.C. § 77k(a) (2000), prohibits a false statement of a material fact in a registration statement, and § 12(a)(2) of the Act, *see id.* § 77l(a)(2), imposes liability for a false statement of material fact in a prospectus.

³⁸² 17 C.F.R. § 240.10b-5 (2006).

³⁸³ *See* Matthew T. Bodie, *Aligning Incentives with Equity: Employee Stock Options and Rule 10b-5*, 88 IOWA L. REV. 539, 595-96 (2003).

³⁸⁴ Commentators on both sides of the mandatory disclosure debate agree that securities markets need strong antifraud protection. *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 486-89 (5th ed. 1998) (arguing that many aspects of securities regulation may impede the flow of information to investors, but noting that investors should be protected from fraud); Alan R. Palmiter, *Toward Disclosure Choice in Securities Offerings*, 1999 COLUM. BUS. L. REV. 1, 130 ("A critical adjunct to my proposal of disclosure choice is that issuers in public offerings would be subject to a mandatory antifraud standard--namely, Rule 10b-5 liability."). Cf. Macey & Miller, *supra* note MM1, at 390 ("The social value of preventing fraud in the sale of securities is too clear to require elaboration.").

³⁸⁵ Bureau of Labor Statistics, Union Members Summary, January 20, 2006, *available at*: <http://www.bls.gov/news.release/union2.nr0.htm>.

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unions and believe that unions are good for the economy.³⁸⁶ However, there is some evidence of concerns about union competence. According to one poll, 71 percent agreed that the government ought to do more to protect union members from corrupt union officials.³⁸⁷ Certainly, images of union corruption have inundated the public since the 1950s. The 1957-1958 Senate hearings on union corruption, chaired by Senator John McClellan and staffed by Robert Kennedy, brought to light many instances of union corruption, including ties with organized crime.³⁸⁸ Episodes of malfeasance by union officials continue. Congress, courts, and commentators have struggled with the best methods of curtail such corruption and have resorted to such extraordinary measures as forced judicial trusteeships with no set time limits.³⁸⁹ While the federal government has had significant success in removing organized crime from certain unions,³⁹⁰ the shadow remains. And in the popular media, shows such as “The Sopranos” portray unions as mere vessels for mafia control of certain industries.³⁹¹

In the capital markets, mandatory disclosure has been called upon to shore up public confidence in securities. The need for public confidence was touted as a key purpose for the New Deal securities legislation³⁹² and has been cited repeatedly as justification for further mandatory

³⁸⁶ See, e.g., Heather Mason Kiefer, Public Remains Positive About Labor Unions, Sept. 13, 2005, available at: <http://poll.gallup.com/content/default.aspx?ci=12751> (showing that 58% approve of labor unions and 54% believe that unions are good for the U.S. economy); John Zogby et al., Nationwide Attitudes Toward Unions, Feb. 26, 2004, available at: http://psrf.org/info/Nationwide_Attitudes_Toward_Unions_2004.pdf (public poll finding that 63 percent approve of labor unions).

³⁸⁷ Zogby et al., *supra* note JZ1, at 15.

³⁸⁸ Michael J. Nelson, Note, *Slowing Union Corruption: Reforming the Landrum-Griffin Act to Better Combat Union Embezzlement*, 8 Geo. Mason L. Rev. 527, 532-37 (2000).

³⁸⁹ For an in-depth discussion of two such trusteeships, see Clyde W. Summers, *Union Trusteeships and Union Democracy*, 24 U. MICH. J.L. REFORM 689 (1991)

³⁹⁰ Jim Jacobs has discussed the federal government’s role in eliminating mob influence from unions extensively. See, e.g., JAMES B. JACOBS, *MOBSTERS, UNIONS AND FEDS: THE MAFIA AND THE AMERICAN LABOR MOVEMENT* (2005); James B. Jacobs et al., *The RICO Trusteeships After Twenty Years: A Progress Report*, 19 LAB. LAW. 419 (2004); James B. Jacobs & Ellen Peters, *Labor Racketeering: The Mafia and the Unions*, 30 CRIME & JUST. 229 (2003).

³⁹¹ *The Sopranos* (HBO broadcast, 1999-2006).

³⁹² Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1, 51 (1983).

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disclosure.³⁹³ The Sarbanes-Oxley Act was perhaps in large part an effort to restore investor confidence after the shocks of 2001 and 2002.³⁹⁴ Although some commentators have criticized the lack of empirical support for this justification,³⁹⁵ there is no question that market confidence encourages investment in equities.³⁹⁶ In fact, the system of public securities regulation could be considered a government subsidy to investors and issuers. By taking steps to insure the integrity of the markets, the government saves investors and issuers enforcement costs that they would otherwise bear. Our securities market would not be as strong without this system of public intervention.³⁹⁷

One purpose of mandatory disclosure is to make fraud more difficult. Passed in the midst of the bust following the boom of the 1920s, the New Deal securities acts aimed at eliminating fraud through greater disclosure and penalties for noncompliance. Required disclosure was seen as a way of bringing more “sunlight,” in Brandeis’ famous phrase, into the inner workings of corporate shares.³⁹⁸ Preventing fraud was only one end of the spectrum, however. On the other end, proponents and enforcers of the New Deal acts hoped that the outflow of information would lead to better pricing and trading on the markets. The Acts, particularly the 1933 Act, were seen as a way of making sure the securities markets acted rationally. In a 1933 article supporting the legislation, William O. Douglas and George E. Bates wrote that the effects of the 1933 Act would be: “(1) prevention of excesses and fraudulent transactions, which will be hampered and deterred merely by the requirement that their deals be revealed; and (2) placing in the market during the early stages of the life of a security a body of facts which, operating indirectly through

³⁹³ Easterbrook & Fischel, *supra* note EF1, at 692 (“The justification most commonly offered for mandatory disclosure rules is that they are necessary to ‘preserve confidence’ in the capital markets.”).

³⁹⁴ Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417 (2003) (stating that the August 2002 financial statement certifications required under Sarbanes-Oxley helped convince investors that firms as a whole were not dishonest or poorly-run).

³⁹⁵ *Id.* at 693.

³⁹⁶ *Id.*

³⁹⁷ See Black, *supra* note BB1, at 782-85.

³⁹⁸ See LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW BANKERS USE IT* 92 (1914) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).

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investment services and expert investors, will tend to produce more accurate appraisal of the worth of the security”³⁹⁹ Echoing the thoughts of Douglas and Bates, the SEC later explained the purpose of the 1933 Act as twofold:

The Securities Act, often referred to as the ‘truth in securities’ Act, was designed not only to provide investors with adequate information upon which to base their decisions to buy and sell securities, but also to protect legitimate business seeking to obtain capital through honest protestation against competition from crooked promoters . . .
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. .

Mandatory disclosure will not prevent fraud; the securities markets amply demonstrate that. But mandatory disclosure creates a market environment that is richer in information and less susceptible to breed the most overt kinds of fraud. Such an environment will help boost public confidence in the market itself. Just as mandatory disclosure has been employed to improve public confidence in the securities markets, it may be useful in boosting public confidence in the market for union representation.

PART IV: DISCLOSURE UNDER THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

Although a regime of information disclosure would be new for the union representation campaign, it would not be for unions themselves. The National Labor Relations Board regulates the relationship between union and employers and creates the regulatory regime for the initial choice by employees whether or not to join a union. The Department of

³⁹⁹ William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 172 (1933).

⁴⁰⁰ 10 S.E.C. Ann. Rep. 14 (1944). *See also* Securities and Exchange Commission, *The Work of the Securities and Exchange Commission 1* (1967) (stating that the New Deal Acts require disclosure so that “investors may make a realistic appraisal of the merits of securities and thus exercise an informed judgment in determining whether to purchase them”), quoted in George J. Bentson, *The Effectiveness and Effects of the SEC’s Accounting Disclosure Requirements*, in *ECONOMIC POLICY AND THE REGULATION OF CORPORATE SECURITIES* 23, 24 (Henry G. Manne, ed. 1969).

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Labor oversees the management and organization of the union itself, including internal union elections and a union's relationship with its members. While the NLRB may not require disclosure in the representation election context, the Department of Labor requires unions to provide extensive disclosure to their members.⁴⁰¹ This disclosure is provided for by the Labor-Management Reporting and Disclosure Act (LMRDA or Landrum-Griffin Act), and covers much of the union's internal governance and finances. Thus, a system of mandatory disclosure in the representation context could piggyback off the existing LMRDA system, if there is overlap between the two sets of disclosures.

Labor organization disclosures are set forth in Title II of the LMRDA. Section 201(a) of the Act requires unions to provide the Department of Labor with a copy of its constitution and bylaws.⁴⁰² In addition, the union is required to file a report providing the names and titles of union officers, the union's dues and fees structure, and detailed statements about the union's procedures for such matters as qualifications for or restrictions on membership, authorization for disbursement of funds, audit of financial transactions of the labor organization, the calling of regular and special meetings, the selection of officers and stewards, imposition of fines, suspensions, and expulsions of members, authorization for bargaining demands, ratification of contract terms, and authorization for strikes.⁴⁰³ Section 201(b) of the Act requires that unions file annual reports, signed by the president and treasurer, disclosing details about the union's

⁴⁰¹ In many ways, the split between the two systems resembles the split in regulation of the sale of securities. The federal system of required disclosure for the sale of corporate securities proceeds largely in two steps. First, before a firm decides to offer a security for sale, it must proffer extensive information about itself, its finances, its prospects, the expected price, and other information deemed relevant to potential buyers. Second, once the security has been sold to initial buyers and thereafter is traded on the public markets, firms have a continuing obligation to disclose relevant financial information, insider transactions, executive compensation, and other matters relevant to the security's value. Each step is established largely by one of the New Deal securities acts: the Securities Act of 1933 is primarily about initial disclosure, while the Securities Exchange Act of 1934 primarily concerns the trading of securities on public markets. THOMAS L. HAZEN, *TREATISE ON THE LAW OF SECURITIES REGULATION* [ch. 1] (4th ed. 2002). In this respect, as in the market for union representation, there are two disclosure paradigms: one for the initial "purchase" and one for "members" after purchase.

⁴⁰² 29 U.S.C. § 431(a) (2000).

⁴⁰³ *Id.*

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financial condition and operations.⁴⁰⁴ Specifically, the Act requires disclosure of assets and liabilities, receipts during the year and sources for the receipts, salaries and other disbursements for all officers and employees making more than \$10,000, loans of more than \$250 to officers and employees, all loans to business enterprises, and “other disbursements made by [the union].”⁴⁰⁵ The Secretary of the Department of Labor is given authority to prescribe the rules and regulations for filing the annual reports.⁴⁰⁶

Since 1960 the Department of Labor has provided forms through which unions meet the disclosure requirements under Landrum-Griffin. Form LM-1 is the initial form that covers the requirements of § 201(a) of the Act.⁴⁰⁷ Forms LM-2, LM-3, and LM-4 are the annual reports that cover a union’s organizational and financial disclosure under LMRDA § 201(a) and (b). Form LM-2 is the form for largest unions; the amounts changed over time, but recent 2003 amendments placed the threshold at unions with receipts of \$250,000 or more.⁴⁰⁸ The Department of Labor estimates that while only twenty percent of unions meet this threshold, these unions received about ninety-three percent of the total dollars received annually by unions.⁴⁰⁹ Forms LM 3 and LM-4 are simplified forms for smaller unions.⁴¹⁰ In 2003, the Department of Labor gave the regulations their first significant overhaul in more than forty years. What follows is a more detailed discussion of the disclosure requirements provided for by the Department of Labor’s regulations.

A. Dues and Fees

The initial form requires that the union set forth its dues and fees structure.⁴¹¹ All three forms provide for the disclosure of the dues and

⁴⁰⁴ 29 U.S.C. § 431(b) (2000).

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* § 438.

⁴⁰⁷ 29 C.F.R. §§ 402.2-402.3 (2006).

⁴⁰⁸ 29 C.F.R. § 403.2(d) (2006).

⁴⁰⁹ *Recent Regulation*, *supra* note RR1, at 1736.

⁴¹⁰ Form LM-3 is a four-page report for unions with receipts less than \$200,000, 29 C.F.R. § 403.4(a)(1) (2006), and Form LM-4 is a two-page report for unions with receipts of less than \$10,000, *id.* § 403.4(a)(2).

⁴¹¹ Form LM-1 Labor Organization Information Report 2, *available at*: http://www.dol.gov/esa/regs/compliance/olms/GPEA_Forms/LM%20-%201p.pdf.

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fees required by the union for members.⁴¹² The categories are: regular dues and fees, initiation fees, transfer fees, and work permits.⁴¹³

B. Organizational Structure

The union is required to disclose a number of facts about its organizational structure. In its initial filing, the union is required to provide a copy of its constitution and bylaws to the Department of Labor.⁴¹⁴ In conjunction with these governing documents, the union must prepare a report citing to the page, section, and/or paragraph number of the governing documents that cover certain procedures. As noted in the discussion of LMRDA § 201(a), these procedures include qualifications for or restrictions on membership, authorization for disbursement of funds, audit of financial transactions of the labor organization, the calling of regular and special meetings, the selection of officers and stewards, imposition of fines, suspensions, and expulsions of members, authorization for bargaining demands, ratification of contract terms, and authorization for strikes.⁴¹⁵ The initial report also requires the union to list its officers, as well as the date of the next election.⁴¹⁶ In its annual financial report, the union is required to list all of its officers,⁴¹⁷ the date of its next election of officers,⁴¹⁸ and the number of members it has.⁴¹⁹

C. Financial Disclosure

⁴¹² Form LM-2 Labor Organization Annual Report 2, *available at*: http://www.dol.gov/esa/regs/compliance/olms/lm2_blankForm.pdf; Form LM-3 Labor Organization Annual Report 2, *available at*: http://www.dol.gov/esa/regs/compliance/olms/lm3_blankForm.pdf; Form LM-4 Labor Organization Annual Report 2, *available at*: http://www.dol.gov/esa/regs/compliance/olms/lm4_blankForm.pdf.

⁴¹³ Form LM-2, *supra* note LM2, at 2; Form LM-3, *supra* note LM3, at 2. Form LM-2 also includes a category for “working” dues and fees, as opposed to regular dues and fees. Form LM-2, *supra* note LM2, at 2. Form LM-4 only requires the union to report any changes in its dues or fees structure. Form LM-4, *supra* note LM4, at 2.

⁴¹⁴ 29 C.F.R. § 402.1 (2006).

⁴¹⁵ Form LM-1, *supra* note LM-1, at 3.

⁴¹⁶ Form LM-1, *supra* note LM-1, at 2.

⁴¹⁷ Form LM-2, *supra* note LM2, at Schedule 11; Form LM-3, *supra* note LM3, at 3.

⁴¹⁸ Form LM-2, *supra* note LM2, at 2; Form LM-3, *supra* note LM3, at 2.

⁴¹⁹ Form LM-2, *supra* note LM2, at 2; Form LM-3, *supra* note LM3, at 2; Form LM-4, *supra* note LM4, at 2.

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Prior to the 2003 changes to the regulations, the Department of Labor asked unions to disclose their overall assets and liabilities, as well as their general receipts and disbursements.⁴²⁰ Unions are now not only required to list their general receipts and disbursements, but to itemize them as well (for amounts greater than \$5,000).⁴²¹ Separate schedules provide for the itemization of accounts receivable,⁴²² loans receivable,⁴²³ investments and fixed assets,⁴²⁴ and other assets and liabilities.⁴²⁵ Unions must also itemize individual receipts and disbursements made to support particular union functions, such as contract negotiation and administration, organizing, and political activities.⁴²⁶ In addition to these itemizations, unions must also break down the time each officer or employee spends on the various activities of the organization.⁴²⁷

D. Example: Local Union 1199, Service Employees International Union

Looking at an actual set of disclosures may assist in illuminating the nature and extent of those disclosures. The 2004 LM-2 provided by Local 1199 of the Service Employees International Union is one such example;⁴²⁸ it is available online through a search of the Department of Labor's website.⁴²⁹ The 196-page document provides the annual

⁴²⁰ See *Recent Regulation*, *supra* note RR1, at 1735.

⁴²¹ 68 Fed. Reg. 58,374, 58,429-30 (Oct. 9, 2003).

⁴²² Form LM-2, *supra* note LM2, at Schedule 1.

⁴²³ *Id.* at Schedule 2.

⁴²⁴ *Id.* at Schedule 3 (sales of investments and fixed assets); Schedule 4 (purchases of investments and fixed assets); Schedule 5 (investments); Schedule 6 (fixed assets).

⁴²⁵ *Id.* at Schedule 7 (other assets); Schedule 10 (other liabilities).

⁴²⁶ See *id.* Schedule 14 covers "other receipts," schedule 15 covers "contract negotiation and administration," schedule 16 covers "organizing," schedule 17 covers "political activities," schedule 18 covers "lobbying," schedule 19 covers "contributions, gifts, and grants," schedule 20 covers "benefits," schedule 21 covers "general overhead," and schedule 22 covers "other disbursements." See also Form LM-2 Labor Organization Annual Report 18, *available at*:

http://www.dol.gov/esa/regs/compliance/olms/lm2_blankForm.pdf.

⁴²⁷ 68 Fed. Reg. at 58,471; Form LM-2, *supra* note LM2, at Schedule 11.

⁴²⁸ Form LM-2 Labor Organization Annual Report, Local 1199, Service Employees International Union, March 28, 2005 (on file with author) [hereinafter Local 1199 Form LM-2].

⁴²⁹ The Department of Labor, Office of Labor-Management Standards, maintains a website through which it is possible to obtain electronic versions of union annual reports. Department of Labor, LMRDA Reporting and Public Disclosure, *at*: <http://www.dol.gov/esa/regs/compliance/olms/rrlo/lmrda.htm>.

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disclosure for Local 1199, one of the largest and most successful unions in the country.⁴³⁰ According to the 2004 form, Local 1199 has 240,000 members, roughly \$60 million in assets, and roughly \$15 million in liabilities.⁴³¹ Dues range from \$13.00 to \$75.00, with initiation fees ranging from \$75 to \$200.⁴³² The union received over \$100 million in dues, and total receipts were over \$137 million. The LM-2 also provides a breakdown of investments, fixed assets, other assets, sales and purchases of investments and assets, and loans payable.⁴³³

The LM-2 also provides a list of all officers as well as their total compensation. The form lists 131 officers who receive a total of over \$5 million in total compensation.⁴³⁴ Union president Dennis Rivera received \$147,710 in total compensation for 2004.⁴³⁵ The next regular election of officers is not until June 2007.⁴³⁶ The form also itemizes all disbursements to employees; each employee is listed by name, title, and total compensation.⁴³⁷ Finally, there are schedules for benefits, contributions, gifts, and grants, office and administrative expenses, and other receipts and disbursements.⁴³⁸

How much of this information would be useful for employees contemplating joining SEIU? How likely are they to obtain it? If they obtain it, how likely are they to read it? Below is an effort to begin answering these questions.

PART V. A NEW MODEL FOR REPRESENTATION ELECTION REGULATION

The primary purpose of this paper is to begin the conversation about a new model for regulating the union representation election. The current system is a strange admixture of ambiguous and heavy-handed requirements about what may be said combined with a completely hands-off approach to what must be said. As a result, unions and employers

⁴³⁰ For more information about Local 1199, visit their website at: <http://www.1199seiu.org/>.

⁴³¹ Local 1199 Form LM-2, *supra* note 1199LM, at 2, 3.

⁴³² *Id.* at 2.

⁴³³ *Id.* at Schedules 1 through 8.

⁴³⁴ *Id.* at Schedule 9.

⁴³⁵ *Id.*

⁴³⁶ *Id.* at 2.

⁴³⁷ *Id.* at Schedule 10.

⁴³⁸ *Id.* at Schedules 11 though 15.

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must step carefully during the campaign so as to avoid statements or behavior that violate the Board's "laboratory conditions" doctrine. At the same time, the Board makes no effort to ensure that employees get the information they need to make an economically rational decision, other than to provide unions with the names and addresses of those workers whom they are courting. The resulting system may be the worst of all possible worlds.

In order to redesign the regulation surrounding the union representation election, I propose three facets to a new regulatory model: (a) required disclosure by unions, (b) required disclosure by employers if they wish to participate in the campaign, and (c) a more hands-off approach to regulation, except in the case of misrepresentation. These three reforms are discussed in more detail below.

A. *Required Union Disclosure*

As discussed in Part IV, there is reason to believe that the union representation election process suffers from informational failures. Information is distributed asymmetrically, and unions and employers may lack the proper incentives to insure that employees get the information they need to make the decision. As in the securities regulation context, as well as many other contractual contexts, a system of mandatory information disclosure would be useful in ensuring that consumers get relevant information.

What would such a system look like? My hope is that this article will spur debate about exactly this question. But I would like to set forth a few preliminary thoughts the content of the disclosure, as well as the means of delivering that content to employees.

1. *Content*

What sorts of information are relevant and material to the union representation question? The answer may vary by election, by individual, and by time period. Further empirical research would be extremely useful in determining exactly what workers want to know in making their decision.⁴³⁹ The following categories serve as a starting point in determining what data workers might want.

⁴³⁹ As discussed earlier, one empirical study discounted the importance of information received by employees during the campaign. See GETMAN ET AL., *supra* note JG1, at 62-64 (finding employees generally voted as they thought they would before the campaign), 76-80 (finding a low recognition rate for campaign issues), 140-43 (arguing

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(a) *Dues and fees.* Obviously, employees would want to know how much their dues would be and what initiation fees would be required. The LMRDA requires disclosure of union dues in both the union's initial filings and in its annual reports.⁴⁴⁰ As the Local 1199 SEIU example demonstrates, however, the union may disclose a range of dues and fees, rather than a specific amount. In such cases, employees would want to know exactly how much the union is proposing to charge in their particular case.

Employees may also want a sense of whether those dues are likely to change in the next few years. Given the difficulties of exit, employees are essentially signing up for a three-year contract when they agree to union representation. Although unions may not know what their future financial needs will be, they may have information about future dues prices that would be useful to the employees' decision. The union could be required to disclose whether any dues or fees hikes are set to be voted on by the members, or whether union officials have plans for such an increase in the upcoming year.

(b) *Organizational structure.* Like any organization, potential members generally would want to know how the union is structured and what its policies are for members. The union must disclose its constitution and bylaws under the LMRDA. Form LM-1 asks the union to list such information as qualifications for or restrictions on membership, authorization for disbursement of funds, the types of audits the labor organization undergoes, the calling of regular and special meetings, the selection of officers and stewards, the circumstances under which fines, suspensions, or expulsions can be imposed, and the requirements for authorizing bargaining demands, contract terms, and strikes.⁴⁴¹ In addition, members may want to know who the union officials are, their backgrounds, and perhaps even their salaries.⁴⁴² Form

that hands-off regulation is proper, given the lack of importance to the campaign itself). However, as noted, critics have charged that the data did not support the authors' normative claims. See *supra* text accompanying notes XXX-YYY. In addition, the study was focused on whether the campaign affected workers' attitudes, not whether workers were getting the information they needed to make economically rational decisions.

⁴⁴⁰ Form LM-1, *supra* note LM1; Form LM-2, *supra* note LM2.

⁴⁴¹ *Id.*

⁴⁴² The question of salaries is likely to provoke some controversy. On the one hand, corporations are required to disclose salary information under federal securities law on

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LM-2 requires the disclosure of officials and disbursements to officials. Officials could also be required to provide a short biography that included certain specific facts, such as education, work experience, criminal record, and time with the union.

(c) *Nature and Quality of Services.* Perhaps the most important set of information for employees would concern the nature and quality of the representation services provided by the union. As noted earlier,⁴⁴³ there is a distinct information asymmetry with respect to information about the union's services. Employees who have never belonged to the union do not know how well the union will do in negotiating new terms, avoiding strikes, managing grievances, and keeping dues low. When buying a product, consumers can often see and handle the product, and they are often given the right to return the product if they find it unsatisfactory. Home buyers hire inspectors, tour the home, and still benefit from mandatory disclosure requirements on the part of the seller. But union consumers have a much tougher time predicting how effective the union will be in providing services.

There may be ways to get information about performance to employees making a representation decision. The union's past and current collective bargaining agreements provide concrete facts about the terms and conditions the union has negotiated for other employees. Having access to these contracts would provide a way for workers to comparison-shop. A more speculative form of information would be union predictions about what they expect to negotiate with the employer. The union might present information about what its initial demands would be, and it could even provide information about what it expects to get. It could even disclose the risks that the union will not be able to

the theory that shareholders should know what their agents are making. See 17 C.F.R. § 229.402 (2006); cf. SEC Release Nos. 33-8655, 34-53185 (January 27, 2006), available at: <http://www.sec.gov/rules/proposed/33-8655.pdf> (proposing new rules for executive compensation disclosure). Given that union members have some of the same agency costs concerns that shareholders do, compensation information may be material. See Schwab, *supra* note SS1, at 377-83. However, the purchasers of services generally do not have the right to see the executive compensation for the company from whom they are buying the services. To the extent that employees are simply consumers of union representation services, such information could be much less relevant in comparison to the quality of the services. Cf. Estreicher, *supra* note SE1, at 516-17 (arguing that for-profit unions should be allowed to provide union representation services).

⁴⁴³ See *supra* Part III.B.1.

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negotiate a contract, or the risk that the union will call the employees out on strike at the risk of permanent replacement.

In the world of securities regulation, firms making an initial public offering are required to disclose reams of financial information about itself.⁴⁴⁴ Companies are even expected to make predictions about what future events may damage their prospects of being successful in business.⁴⁴⁵ One could envision a disclosure statement in which unions provided a richer vision of what they expected to achieve and the difficulties they contemplated facing as part of a mandatory disclosure statement. Of course, unions would generally endeavor to be as non-specific as possible, in order to avoid recriminations or liability down the road. Unions could also plausibly argue that such statements would reveal too much of their strategies and would enable the employer to get an advantage in bargaining. As we consider a mandatory disclosure regime, the pros and cons of such “softer” statements should be considered along side the disclosure of “harder” financial data.

(d) Conflicts of Interest. The corporate world places a premium on disclosure whenever a potential conflict of interest arises between a corporate officer and the corporation he or she serves.⁴⁴⁶ Employees are entitled to know about any potential conflict of interest between the union and the employer. Evidence of such a conflict would be any overlap between union personnel and the employer’s personnel, including spouses and other close relatives, or financial ties between the union and the employer.⁴⁴⁷ Current or past collective bargaining relationships between the union and the employer (or an associated company) might also be grounds for a conflict of interest. Moreover, any contracts between the employer and its affiliates and the union (or its affiliates) should also be disclosed to employees. The key here would be to have a sweep broad

⁴⁴⁴ See *supra* text accompanying notes AAA-BBB.

⁴⁴⁵ See 17 C.F.R. § 229.303 (2006) (“Describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations.”).

⁴⁴⁶ See, e.g., *State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co.* 391 P.2d 979, 986 (Wash. 1964) (“A corporation cannot ratify the breach of fiduciary duties unless full and complete disclosure of all facts and circumstances is made by the fiduciary and an intentional relinquishment by the corporation of its rights.”).

⁴⁴⁷ Such ties could be quite attenuated. It would be important to identify all companies in which the employer had a significant ownership stake and to include those companies in any analysis.

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enough to encompass all of the potential conflicts. For example, Teri Moore may be president of the United Forever Union (UFU) and may negotiate a fairly employer-friendly contract with Blue Industries. If Teri also is the treasurer for Americans United Union (AUU), and AUU is seeking to represent employees of Aquamarine Industries, a subsidiary of Blue Industries, then Aquamarine employees should be told about and given access to the UFU contract with Blue. The regulations would have to be written to prevent employers and unions from avoiding the disclosure requirements simply by creating new corporations or labor organizations.

2. Delivery

Given the plethora of potentially relevant information available to disclose, the Board would have to determine the best method for selecting the disclosure and then delivering it to employees. In terms of selecting the information, the Board would face a difficult choice. On the one hand, the Board would want to keep the information disclosure as concise as possible, in order to make it more accessible to employees. Recent concerns about “information overload” have led commentators to reexamine the amount of required disclosure in the realm of securities.⁴⁴⁸ On the other hand, some employees might be willing to spend the extra time to dig through a larger amount of disclosure and would find the extra information useful or even critical in making their decision. Given that union elections can be determined by one employee out of hundreds, it may make sense to give the marginal employee as much information as he or she desires.

Technology may provide the answer to this dilemma. The Board could provide for the mandatory disclosure in two steps. The first step would be a short form distributed to all employees with a few pieces of critical information included. The second step would be an Internet website that would provide access to all of the other information the

⁴⁴⁸ Paredes, *supra* note TP1, at 419. Paredes notes that if a rational actor is forced to process too much data in making a cost-benefit analysis, the actor may adopt one of several decisionmaking heuristics which do not always process the information in a rational manner. *Id.* at 437-43. While acknowledging that most investors rely on expert “filters” such as mutual funds, research analysts, and the business media in making investment decisions, Paredes cites to evidence that these filters are themselves subject to information overload. *Id.* at 452-59. While making no affirmative policy proposals, Paredes counsels that “securities regulation needs to focus to a greater extent on the user of information.” *Id.* at 485.

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Board required to be disclosed. In this manner, all employees would be given a set of disclosure that many would be likely to read. At the same time, the few more industrious employees would have channeled access to important information that may take much longer to absorb.

The primary issue surrounding the first step would be determining the exact scope of the information to be provided. While the Board would want to gather more information and could even consider rulemaking on this issue,⁴⁴⁹ commentators may want to focus on determining what sorts of information employees most want and how to convey that information most concisely. Union dues and fees applicable to the voting employees, for example, could be specified briefly. Terms and conditions of employment in the union's other collective bargaining agreements could not. To some extent, the Board might want to use the short form to tip off employees about information they could get through the website. However, for the most part the Board would want to keep the short form as a simple summary of the most critical facts about the union and its services.

The primary issues surrounding the second step would be the design of the website, the costs in implementing the system, and the likelihood that employees would benefit from the system. In terms of the design, this again is an issue for future policy development by the Board. It should be fairly straightforward, however, to design a standard page for each election which would provide access to the additional sets of information. The Department of Labor has brought its entire LMRDA disclosure system online, making it fairly simple to link to the Department of Labor's website or even directly link to the particular union's disclosure within the Department's database.⁴⁵⁰ Other documents, such as the union's past and present collective bargaining agreements, could be posted to the page as documents that could be

⁴⁴⁹ For a discussion of the Board's antipathy towards rulemaking, see Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387 (1995).

⁴⁵⁰ See Final Regulations, 68 Fed. Reg. at X; Department of Labor, LMRDA Reporting & Disclosure, at: <http://www.dol.gov/esa/regs/compliance/olms/rrlo/lmrda.htm>. Interestingly, ERISA has a requirement that the Secretaries of Labor and the Treasury work together when they are requesting similar information. 29 U.S.C. § 1204 (2000). The NLRB could similarly work with other branches of the Department of Labor to make sure that LMRDA-required information was provided to employees in the midst of a union organizing drive.

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downloaded. Moreover, the page could also link to the union's website in order to provide access to information. In terms of costs, it is fairly simple to create a webpage, and Board technicians could use the same web design for each representation election. It would be far more simple to post electronic versions of collective bargaining agreements on the web, as opposed to photocopying these agreements and distributing them to employees. Finally, there is some question as to whether employees would use such a system. However, computer ownership and Internet use continue to grow across the country.⁴⁵¹ Many employees have access to the Internet at work. As many other commentators have suggested, using the web is a cost-effective, extremely accessible method of distributing lots of information to a large number of employees.⁴⁵² It can overcome the *Lechmere* access problems that have made it difficult for information to reach employees. Combining access to the union with access to mandatory disclosure about the union would provide an ideal mix of information to employees.

B. Employer Disclosure

This article has focused primarily on the need for employees to get information about the union offering its services. Given that unions are seeking to provide services on behalf of the employees, it makes sense to focus on their dues, internal organization, quality of services and potential conflicts of interest. However, employees also find information about the employer relevant to their representation decision. Although there is ample ground for further discussion and research, this article proposes a system of employer disclosure in which employers would be given an option. The employer could provide a set of mandatory disclosures and then participate in the campaign, or the employer could remain neutral and provide no disclosure. This option would provide

⁴⁵¹ Recent polls have shown that 73 percent of Americans use the Internet. Lawrence Rout, *Broadband: Online Audience Grows--from Different Directions*, WALL ST. J., Sept. 13, 2004, at R2.

⁴⁵² See Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1 (2000); Susan S. Robfogle, *Electronic Communication and the NLRA: Union Access and Employer Rights*, 16 LAB. L.J. 231 (2000); Gwynne A. Wilcox, *Section 7 Rights of Employees and Union Access to Employees: Cyber Organizing*, 16 LAB. L.J. 253 (2000); Elena N. Broder, Note, *(Net)Workers' Rights: The NLRA and Employee Electronic Communications*, 105 YALE L. J. 1639 (1996); Wissinger, *supra* note MW1, at 347-48.

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employers with a choice. They could contest the union's efforts by putting their own cards on the table, or they could stay out of the process entirely.

What kinds of information would the employer provide? Again, further research is necessary to determine exactly what kinds of employer information are relevant and important to making a rational union representation election. Ties to the union are certainly relevant, and it may make sense to impose a duty on the employer to make disclosures about any potential conflicts of interest between itself and the union. The company's finances are also relevant, as its financial condition may dictate what level of wages and benefits it could provide to employees. Much of the information useful to potential shareholders would also be useful to employees contemplating unionization (albeit perhaps for different reasons). In this regard, the Board could piggyback off disclosures made by publicly-traded companies to the SEC. Like the Department of Labor's web-based database of LMRDA disclosure, the SEC maintains EDGAR, an electronic database of all public disclosure by publicly-held companies. The Board could provide a link to the employer's disclosures through the election website, just as it would link to union disclosures at the website as well.

This system of optional disclosure would have two policy effects. The first effect would be to increase the availability and accessibility of information about the employer to employees. The second effect would be to put a premium on employer participation within the campaign. For large publicly-held companies, the disclosure might only mean providing another copy of information that is already publicly available. For smaller, closely-held companies, however, the required disclosure would pose a significant burden. Not only would the company have to collect the information, it would also have to disclose much of the previously-private inner workings of the business organization. Private companies may be private in part to avoid the SEC's mandatory disclosure requirements.⁴⁵³ Avoiding such disclosure may be worth the costs of remaining neutral in an NLRB election.

This effect raises the possibility of either *de facto* or *de jure* exclusion of the employer from the representation campaign. It is now the received wisdom of the labor relations academy that employers

⁴⁵³ COX & HAZEN, *supra* note CH1, at 644.

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effectively play on employees' fears in conducting their antiunion campaigns.⁴⁵⁴ The primary justification for employer involvement in the union campaign is the employer's role in providing negative information about the union to employees.⁴⁵⁵ If mandatory union disclosure provides much of the critical information that employers have traditionally provided, then perhaps employers should be excluded from the campaign. Such an exclusion, however, would have to overcome complicated free speech and informational concerns.⁴⁵⁶ On the other hand, a system of optional disclosure would put a price on participation – a price rationally related to representation election regulation.

C. Reconfiguring Campaign Regulation

The Board's regime of representation election regulation has long been criticized for its indeterminate and hair-splitting standards.⁴⁵⁷ Since the Board has not been all that concerned with managing the information in the campaign, the proposed system of disclosure would not necessarily affect the Board's prohibitions on coercion, bribery, or inflammatory appeals; such regimes could coexist. At the same time, a new disclosure regime might provide an opportunity for the Board to reexamine the current prohibitions and adopt a simpler, more streamlined system. If the union and employer are providing critical information to the employees up front, then perhaps employees will place less emphasis on the information they learn from the participants during the campaign. However, given the different purposes of much of the Board's regulation,

⁴⁵⁴ See, e.g., Larry Cohen & Richard W. Hurd, *Fear, Conflict and Union Organizing*, in *ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES* 181, 181 (Kate Bronfenbrenner et al. eds., 1998).

⁴⁵⁵ See *supra* Part II.C.

⁴⁵⁶ Section 8(c) of the NLRA, which was added by the Taft-Hartley amendments, provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c) (2000). The Supreme Court has noted that § 8(c) "merely implements the First Amendment." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). However, the Board has held that since § 8(c) only applies to unfair labor practices, it can go beyond § 8(c) in regulating representation campaigns. See, e.g., *General Shoe Corp.*, 77 NLRB 124, 127 (1948). Whether the First Amendment would prohibit complete employer exclusion is an open question.

⁴⁵⁷ See *supra* Part II.A.

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perhaps there need not be any changes to the Board's efforts to regulation speech and conduct that has the tendency to coerce employees in the exercise of their choice.

However, there is one reform that would substantially supplement and strengthen the disclosure regime: penalties for misrepresentation and fraud. Unlike perhaps every other regime of commercial regulation, the Board's regulation of the union representation election does not penalize for fraud. This failure is anathema to the need for employees to trust the information they are getting from unions and employers. Required disclosures would be useless if there are no penalties for failures or misrepresentations in those disclosures. The Board should, at the least, treat material misrepresentations as grounds for overturning an election, and it should treat any error or omission in the mandatory disclosure as *per se* material. The Board could also consider stronger penalties such as monetary damages or injunctive relief. In making a union representation decision, employees should be protected against fraud as consumers generally are when making economic decisions.⁴⁵⁸ The Board should not tolerate fraud.

D. Intended Effects of the New Regime

In laying out a framework for reform, I wish to conclude by talking about the two general goals of these reforms – two effects they should endeavor to create. First, the disclosure regime should highlight many of the more egregious conflicts of interest between labor organizations and employers. If ties between the union and company are highlighted for employees, employees will be in a much better position to police such ties. Second, a more rational and organized system of information regulation will help employees make more informed and rational decisions. And to the extent that employees could better trust the information they are getting, they may feel more comfortable to committing themselves to union membership. Certainly, better information could lead to the result that even fewer employees decide to join unions. But whatever the result, a system of disclosure would provide employees with the tools to better evaluate the decisions before

⁴⁵⁸ Kent Greenfield has criticized the lack of fraud protection for employees in the context of the labor market. Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 YALE L.J. 715 (1997).

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them. In the long run, more rational decisions will mean more efficient ones, which will ultimately leave society better off.

CONCLUSION

The Board, courts, and academic commentators have (with good reason) focused on employer coercion and administrative delay as key concerns in the regulation of the union representation election. However, the critical role of information – information necessary to make an efficient representation decision – has been neglected. This paper argues for a new approach to representation elections: one that creates disclosure requirements for both unions and employers, as well as one that empowers the Board to manage the flow of information to employees. At the least, this new approach will help prevent conflicts of interest that despoil the relationship between a union and its members. However, such a process may ultimately lead to a newly invigorated market for representation driven by a wiser, more informed class of employees.